CALIFORNIA JUDGES BENCHGUIDES

Benchguide 92

PRELIMINARY HEARINGS

[REVISED 2012]

ADMINISTRATIVE OFFICE
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Editorial comments and inquiries: Kimberly DaSilva, Attorney 415-865-4534,
fax 415-865-4335

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PRELIMINARY HEARINGS

I. [§92.1] SCOPE OF BENCHGUIDE

This benchguide provides an individual overview of the procedure for handling a preliminary hearing or examination, and includes procedural checklists, an overview of the applicable law, scripts, and a flowchart.

For a discussion of felony arraignment and pleas, see California Judges Benchguide 91: *Felony Arraignment and Pleas* (Cal CJER).

For an in-depth discussion of preliminary hearings, see Simons, California Preliminary Examinations and 995 Benchbook (LexisNexis, 2012), hereafter cited as Simons, Preliminary Examinations.

For a comprehensive discussion of Pen C §1538.5 suppression motions, see California Judges Benchguide 58: *Motions To Suppress and*

Related Motions: Checklists (Cal CJER) and California Judges Benchbook: *Search and Seizure*, chap 6 (2d ed Cal CJER).

II. PROCEDURE

A. [§92.2] Checklist: Prehearing Conference

(1) *Call the case*. Most judges conduct the prehearing conference in the courtroom. But some judges conduct it in chambers.

(2) *Advise defendant of right to an attorney if an attorney has not been appointed or retained.* If the defendant is not represented, the judge may postpone the preliminary hearing for not less than two nor more than five days to allow the defendant to secure representation. Pen C §860. Before appointing counsel, determine that counsel will be ready to proceed with the preliminary hearing within the prescribed statutory time limits except in unusual cases. Pen C §987.05. For discussion, see §§92.10–92.15.

☛ JUDICIAL TIP: In most cases, a defendant is advised of the right to counsel at the arraignment and counsel will have been obtained or appointed before the preliminary hearing.

(3) *Determine need for interpreter.* If the defendant is unable to understand English, the court must continue the preliminary hearing until an interpreter can be appointed. Cal Const art I, §14. For discussion, see §92.17.

☛ JUDICIAL TIP: The need for an interpreter is normally determined at the arraignment so that an interpreter is available at the preliminary hearing.

(4) *If defendant's competency is in doubt, state doubt on record, and obtain defense counsel's opinion; if defense counsel concurs, order competency hearing.* If defense counsel does not concur, determine whether to exercise the power to order a hearing anyway. See Pen C §1368(a)–(b). After the competency hearing is ordered, all proceedings are suspended except for the preliminary hearing on request of defense counsel. Pen C §§1368(c), 1368.1.

☛ JUDICIAL TIP: If there is any doubt about the defendant's competency, the better course is to stop the preliminary hearing and order a competency hearing. This eliminates a second preliminary hearing if the defendant is later determined to have been incompetent at the first preliminary hearing under the "two preliminary hearings" rule of *Hale v Superior Court* (1975) 15

C3d 221, 223, 124 CR 57, and a nonstatutory motion to dismiss. If defense counsel believes that probable cause is lacking, he or she may request a preliminary hearing to effect an immediate resolution of the issue. If a doubt about the defendant's competence arises during or after the preliminary hearing, the defendant's right of due process is preserved by allowing the defendant to move for dismissal of the information if the case is bound over and holding a second preliminary hearing after the defendant is determined to be competent. *People v Duncan* (2000) 78 CA4th 765, 93 CR2d 173.

(5) *Determine correctness of complaint.* Ask counsel whether they have reviewed the complaint for pleading and other errors, such as alleging a misdemeanor as a felony or misnaming the defendant.

(6) *Explore possibility of negotiated plea.* Ask counsel if they have had an opportunity to consider disposition of the case by a negotiated plea. If not, and they are willing to confer, defer the prehearing conference for a short time to permit discussion. Most judges take an active part in plea discussions. For discussion, see §§92.19–92.27.

(7) *Ask whether defendant will waive the preliminary hearing.* If the defendant agrees, and the prosecutor concurs, take the defendant's personal waiver. For discussion, see §§92.28–92.34. For a script, see §92.111.

(8) *Take time waivers.* If there has been no waiver at the arraignment, ask whether the defendant will waive the ten-court-day and 60-calendar-day time limits for the preliminary hearing. If so, take the defendant's personal waiver. For discussion, see §92.40.

(9) *If defendant does not waive time, ask whether prosecution intends to move for continuance of preliminary hearing for good cause.* For discussion, see §§92.36–92.37.

☛ JUDICIAL TIP: A codefendant case may create a problem when one codefendant requests a continuance for good cause and the other objects to the delay or requests OR release. Because good cause for a continuance for one defendant is good cause for all codefendants, the mandatory OR release under Pen C §859b will not apply to the nonrequesting codefendant. See *In re Samano* (1995) 31 CA4th 984, 993, 37 CR2d 491.

(10) *Determine whether diversion or deferred entry of judgment is appropriate*. For discussion, see §92.18.

(11) *Ask whether defendant intends to move for reduction of felony to misdemeanor under Pen C §17(b)(5).* For discussion, see §92.100.

(12) *Ask whether the defendant intends to move to close the hearing.* For discussion see §§92.53–92.57.

(13) *Ask whether there is a need for special precautions for minor witnesses under the age of 11.* For discussion see §92.62.

(14) *Ask whether defendant intends to move to suppress evidence at preliminary hearing.* For discussion, see §§92.75–92.79.

(15) *Take defendant's plea, if any.* Ask if the defendant will enter a guilty or no-contest plea at this time. If so, advise the defendant of his or her rights and the consequences of the plea. Some judges set the taking of pleas for a later calendar. For a script when the negotiated plea occurs in place of a preliminary hearing, see §92.113. For an alternative script for taking a negotiated plea, see California Judges Benchguide 91: *Felony Arraignment and Pleas* §91.31 (Cal CJER).

(16) *Determine bail if felony plea.* If the defendant's guilty or no-contest plea is to a felony, determine bail and OR motions (see §§92.102–92.104), and set the time for sentencing.

(17) *Set misdemeanor plea for sentencing or impose sentence if defendant waives time under Pen C §1449.*

B. [§92.3] Checklist: Continuing Preliminary Hearing Beyond Ten-Day Limits

(1) *Determine whether preliminary hearing can be continued within ten-day limits (ten court days after later of arraignment or entering plea).* For discussion of limits, see §92.35.

(2) *Determine whether defendant is in custody.* If the defendant is not in custody, then delay of the preliminary hearing beyond the ten-day limit is permitted unless the defendant shows actual prejudice from the delay. For discussion, see §92.41

(3) *Determine whether defendant is in custody solely on current charge.* If the defendant is in custody solely on the current charge, the charge may be dismissed if the preliminary hearing is scheduled beyond the ten-day limit unless there is good cause for the delay. If the defendant is not in custody solely on the current charge, the dismissal is not required regardless of whether there is good cause for the delay. For discussion, see §92.41.

☛ JUDICIAL TIP: Many judges rule on the "solely" issue on a case-by-case basis if the defendant is also charged with a violation of court probation, felony probation, or parole. Some judges will review the files of defendants who are subject to court probation and find those defendants to be in custody solely on the current charge if probation has been violated based only on the current charge. The practice in some counties is to combine hearings on the "solely" issue and probation violation. But those defendants who have violated formal felony probation or parole and whose original case files generally are not available for review are usually not found to be in custody "solely" on the current charge. For discussion of the issue, see §92.41

(4) *Determine whether defendant may be entitled to release on OR.* A defendant in custody solely on the current charge whose preliminary hearing is scheduled beyond the ten-day limit by good cause may be entitled to release on OR if exceptions outlined in Pen C §859b (see below) do not apply. For discussion, see §92.37.

(5) *Determine whether exceptions to automatic entitlement to OR apply when:*

- *Defendant requested continuance beyond ten-day limit,*
- *Capital case in which proof is evident and presumption great,*
- *Necessary witness is unavailable because of defendant's actions,*
- *Counsel is ill or unexpectedly in jury trial, or*
- *There is unforeseen conflict of interest requiring appointment of new counsel.*

Pen C §859b. For flowchart diagram, see Appendix. For discussion, see §92.37.

(6) *Order dismissal or OR, or order defendant to be held in custody as appropriate.*

C. [§92.4] Checklist: Preliminary Hearing

(1) *Call the case.*

☛ JUDICIAL TIP: Some judges instruct their clerks to hand them only the complaint and not the entire file. This reduces the risk of considering police reports and other extraneous materials in the file when determining probable cause. With certain exceptions, a judge is not permitted to read an arrest report at the preliminary

hearing. Pen C §1204.5. One of these exceptions occurs when the judge is setting bail.

(2) *Determine whether defendant is personally present in court.* In general, the defendant must be personally present at the preliminary hearing, but may waive this right or lose this right by disrupting the proceedings. Pen C §§977(b)(1), 1043.5. In a noncapital case, the magistrate may proceed with the preliminary hearing if the defendant becomes voluntarily absent after the hearing has commenced in his or her presence. Pen C §1043.5(b)(2). For discussion, see §92.42.

☛ JUDICIAL TIP: When multiple defendants are joined in a case, some judges prepare a chart listing the name of each defendant, his or her location in the courtroom, the charged offenses, and the evidence supporting each offense. This provides a convenient framework for determining probable cause for each defendant.

(3) *Advise defendant of right to an attorney if an attorney has not been appointed or retained.* The judge may postpone the preliminary hearing for not less than two nor more than five days to allow the defendant to secure representation. Pen C §860. Before appointing counsel, determine that counsel will be ready to proceed with the preliminary hearing within the prescribed statutory time limits except in unusual cases. Pen C §987.05. For discussion, see §§92.10–92.15.

(4) *Determine need for interpreter.* If the defendant is unable to understand English, the court must continue the preliminary hearing until an interpreter can be appointed. See Cal Const art I, §14. The court must also appoint an interpreter for any witness who is unable to understand English. Evid C §752. For discussion, see §92.17.

(5) *If defendant's competency is in doubt, state doubt on record, and obtain defense counsel's opinion; if defense counsel concurs, order competency hearing.* If defense counsel does not concur, determine whether to exercise the power to order a competency hearing anyway. See Pen C §1368(a). After the competency hearing is ordered, all proceedings are suspended except for the preliminary hearing upon request of the defense counsel. Pen C §§1368(c), 1368.1.

(6) *When appropriate, ask if defendant will waive one-session requirement.* If so, take the defendant's personal waiver. If not, conduct the preliminary hearing in one session or consider postponing the hearing for good cause shown in an affidavit or declaration. See Pen C §861(a). For discussion, see §§92.44–92.46. For a script for waiver, see §92.112.

(7) *Ask whether defendant will waive reading of complaint.* In most cases, defense counsel will waive the reading. For discussion, see §92.47.

JUDICIAL TIP: Most judges summarize the alleged charges even when a formal reading of the complaint is waived. This step ensures that all interested parties know which offenses are alleged. It also resolves problems that sometimes arise when an amended complaint has not been placed in the court's file or received by defense counsel. (8) *Rule on any motions to close hearing, or to exclude and protect witnesses.* See §§92.50–92.60.

(9) *Call for presentation of evidence.* For discussion of the use of hearsay evidence and of limitations on the presentation of evid*ence, see §§92.64*–92.68.

(10) *Rule on any motion to suppress evidence under Pen C §1538.5.* For discussion, see §§92.75–92.79.

(11) *Account for all exhibits at close of evidence.* Before ruling on a holding order, the magistrate must know what exhibits have been admitted to evaluate what will serve as evidence for determining sufficient cause.

☛ JUDICIAL TIP: Many judges keep track of exhibits in their notes and record what has been identified and offered and admitted into evidence. At the close of the evidentiary presentation, if any exhibits have been identified but have not yet been offered, the judge invites the respective parties to offer them into evidence, hears any objection, and rules on the admissibility of that exhibit.

(12) *Determine whether to reduce a "wobbler" felony charge to misdemeanor under Pen C §17(b)(5).* For discussion, see §§92.100–92.101.

(13) *Determine if there is sufficient cause to hold defendant.* For discussion, see §§92.85–92.91.

- If there is sufficient cause, issue a holding order under Pen C §872(a) (see §92.89) and determine any motion to set or reduce bail, or release the defendant on OR (see §§92.102–92.104). If the defendant is denied release, order the defendant to be committed to custody.
- If there is not sufficient cause, dismiss the complaint and discharge the defendant under Pen C §871 (see §92.91).

(14) *Include any findings made on evidence in the minutes.* For discussion, see §§92.63–92.70.

III. APPLICABLE LAW

A. Preliminary Hearing Procedure Generally

1. Threshold Considerations

a. [§92.5] Conducting Prehearing Conference

Purpose of conference. Most courts conduct a prehearing conference and generally schedule it two days before the preliminary hearing. This conference may be referred to as a "prepreliminary hearing conference," a "setting conference," or a "preliminary hearing conference." One of its purposes is the early disposition of cases by plea (see §§92.19–92.27) or application of diversion or deferred entry of judgment (see §92.18) when feasible. The prehearing conference is also used for taking waivers of time (see §92.40) and waiver of the preliminary hearing (see §§92.28–92.34), and for resolving pleading and other problems.

High profile case. In a high profile case, some judges set the prehearing conference several days before the preliminary hearing. Among the matters considered is whether the defendant will make a motion to close the hearing under Pen C §868 (see §92.53). If so, the court determines what and how advance notice should be given to the press (see §92.55).

Anticipated motions. At the conference, many judges ask if defense counsel intends to make a motion to suppress under Pen C §1538.5 at the preliminary hearing (see §§92.75–92.79). This information helps the judge to calendar the preliminary hearing realistically and to explore the range of evidence to be introduced, including the strengths and weaknesses of the prosecution and defense cases. In many cases, this information also permits the prosecutor to call witnesses necessary to litigate the motion, thereby avoiding a continuance.

Many judges also ask whether defense counsel intends to make a motion at the preliminary hearing to reduce a "wobbler" charged as a felony to a misdemeanor under Pen C §17(b)(5) (see §§92.100–92.101) or whether the defense counsel or prosecutor intends to move to close the hearing (see §§92.53–92.59).

Attendance at conference. The prosecutor, defense counsel, and the defendant must be present at the conference, as essential parties for effective plea negotiation.

b. [§92.6] Purpose of Preliminary Hearing

The purpose of a preliminary hearing is to establish whether probable cause exists to believe that the defendant has committed a felony. Pen C

§866(b); *Whitman v Superior Court* (1991) 54 C3d 1063, 1080–1081, 2 CR2d 160. A preliminary hearing, however, may not be used for the purpose of discovery. Pen C §866(b).

Determining whether probable cause exists at a preliminary hearing can weed out groundless charges of grave offenses and relieve the accused of the degradation and expense of a criminal trial. It also can operate as a judicial check on the exercise of prosecutorial discretion and help ensure that the defendant is not charged excessively, which could confer a tactical advantage upon the prosecutor in respect to plea bargaining. *People v Herrera* (2006) 136 CA4th 1191, 1202, 39 CR3d 578. In addition to acting as a check on prosecutorial overreaching, determining that probable cause exists ensures that a defendant is not detained for a crime that was not committed. *People v Plengsangtip* (2007) 148 CA4th 825, 835, 56 CR3d 165.

A preliminary hearing is conducted by a magistrate after a defendant has been arraigned and has pleaded not guilty to one or more felony charges lodged in the complaint. See Pen C §§738, 860.

The California Constitution requires a preliminary hearing for a defendant charged in a complaint with one or more felonies. Cal Const art I, §14. A preliminary hearing must be held before a magistrate to ensure that there is enough evidence to hold the defendant to answer. See Pen C §872(a). The California Constitution also provides, however, that a preliminary hearing cannot be held if a felony prosecution is initiated by a grand jury indictment. Cal Const art I, §14.1; *Bowens v Superior Court* (1991) 1 C4th 36, 49, 2 CR2d 376.

c. [§92.7] Probable Cause

At the preliminary hearing, the prosecution must present sufficient evidence to convince the magistrate that probable cause exists to believe that a crime has been committed and that the defendant committed the crime. Pen C §§866(b), 872(a). See §92.85. If the prosecution shows probable cause, the magistrate holds the defendant to answer to the charge, and the prosecution must then file an information with the court within 15 calendar days. Pen C §§739, 1382(a)(1). If the magistrate finds insufficient evidence that probable cause exists, the magistrate must dismiss the case. See *People v Superior Court* (Jurado) (1992) 4 CA4th 1217, 1226, 6 CR2d 242. At the preliminary hearing, the magistrate must be convinced only of such a state of facts as would lead a reasonable person to believe and conscientiously entertain a strong suspicion of the defendant's guilt. *People v San Nicolas* (2004) 34 C4th 614, 654, 101 P3d 509; *Roman v Superior Court* (2003) 113 CA4th 27, 32, 5 CR3d 807; *Hatch v Superior Court* (2000) 80 CA4th 170, 184–185, 94 CR2d 453. The evidence that

will justify a prosecution need not be sufficient to support a conviction. 80 CA4th 185. All that need be shown is some rational ground for assuming the possibility that an offense has been committed and that the defendant committed it. 80 CA4th at 185.

d. [§92.8] Conducting Preliminary Hearing

Who may conduct hearing. Only a magistrate may conduct a preliminary hearing. *People v Haskett* (1982) 30 C3d 841, 858, 180 CR 640 (court commissioner may not conduct preliminary hearing absent consent of all parties); Simons, Preliminary Examinations §§4.9.1–4.9.2. Magistrates include judges of the supreme court, courts of appeal, and superior courts. Pen C §808. A judge who presides over a preliminary hearing does so in the capacity of a magistrate, not as a judge of the superior court. *People v Thompson* (1990) 50 C3d 134, 155, 266 CR 309. A magistrate who presides over a preliminary hearing may also preside over the trial of the case unless a ground for disqualification exists. *People v DeJesus* (1995) 38 CA4th 1, 17, 44 CR2d 796 A magistrate's powers at a preliminary hearing are purely statutory. *People v Superior Court* (Feinstein) (1994) 29 CA4th 323, 328, 34 CR2d 503.

For a discussion of potential problems when the same judge hears all pretrial proceedings in felony cases, see Simons, Preliminary Examinations §§4.8.1–4.8.6.

Duration of hearing. In most cases, the preliminary hearing is quite short, lasting from one-half to two hours. Most preliminary hearings involve only prosecution evidence and defense cross-examination of prosecution witnesses. But a defendant may be permitted to call witnesses to establish an affirmative defense on a proper showing. Pen C §866(a). See §92.68.

e. [§92.9] Proper Venue

A preliminary hearing may be heard in any superior court in the county where the offense occurred, although not necessarily in a specific judicial district within that county. *Stanley v Justice Court* (1976) 55 CA3d 244, 249–255, 127 CR 532. Some statutes relating to venue permit more than one county to be a proper site for the prosecution of an offense. See, *e.g.*, Pen C §§786–787, 791.

A magistrate has the authority to transfer the hearing to another judicial district in the same county, after balancing the parties' and the court's best interests, and considering the hardships involved. *Gray v Municipal Court* (1983) 149 CA3d 373, 375, 196 CR 808.

f. Appointing Counsel

(1) [§92.10] Advise of Right to Counsel

Most defendants are represented by an attorney at the preliminary hearing. At the arraignment, the court must advise a defendant of the right to an attorney, and that if the defendant cannot afford an attorney, the court will appoint one. Pen C §987(a)–(b). See discussion in California Judges Benchguide 91: *Felony Arraignment and Pleas* §91.6 (Cal CJER).

(2) [§92.11] Waiver of Right to Counsel

Advisement. If the defendant appears without an attorney at the preliminary hearing and the court has not taken a *Faretta* waiver of the right to counsel from the defendant (see discussion in California Judges Benchguide 91: *Felony Arraignment and Pleas* §§91.11–91.14 (Cal CJER)), the court must advise the defendant of the right to counsel, and ascertain whether the defendant waives this right. Cal Const art I, §15 (right to counsel at all critical stages of criminal proceeding); Pen C §§858, 859; *Coleman v Alabama* (1970) 399 US 1, 7, 90 S Ct 1999, 26 L Ed 2d 387; *People v Coleman* (1988) 46 C3d 749, 773, 251 CR 83; *People v Boulware* (1993) 20 CA4th 1753, 1756, 25 CR2d 381 (right to counsel at preliminary hearing waived when defendant elected to go forward with hearing despite court's willingness to grant continuance to obtain counsel).

Capital cases. In a capital case, the magistrate must inform the defendant that he or she must be represented by counsel. Pen C §859. Such a defendant may not enter a guilty plea unless represented by counsel and counsel consents to the plea. Pen C §1018. The right to counsel is self-executing. The defendant is not required to request counsel in order to be entitled to legal representation. *People v Marshall* (1997) 15 C4th 1, 20, 61 CR2d 84.

But a defendant accused of a capital crime, who elects self-representation (see discussion below), may waive the right to counsel, as well as other important rights conferred by constitutional and statutory law, such as the right to be present at all critical stages of the proceeding. *People v Farnam* (2002) 28 C4th 107, 146, 121 CR2d 106; *People v Koontz* (2002) 27 C4th 1041, 1074, 119 CR2d 859 (self-representation right guaranteed by *Faretta* applies in capital case); *People v Lawley* (2002) 27 C4th 102, 145, 115 CR2d 614 (self-represented defendant has no constitutional right to appointment of advisory counsel.).

Self-representation. A defendant has a federal constitutional right under the Sixth Amendment to self-representation. *Faretta v California* (1975) 422 US 806, 819, 95 S Ct 2525, 45 L Ed 2d 562; *People v Koontz*, *supra*, 27 C4th at 1069. If the defendant is competent to stand trial but is

so mentally ill as to be unable to conduct trial proceedings, however, self-representation may be denied. *Indiana v Edwards* (2008) 554 US 164, 176–178, 128 S Ct 2379, 171 L Ed 2d 345; *People v Johnson* (2012) 53 C4th 519, 530, 136 CR3d 54 (California has accepted *Edwards* invitation for state courts to set higher standard for self-representation than for competency to stand trial; the standard to apply, as set forth in *Edwards*, is whether defendant suffers from severe mental illness to point where he or she cannot carry out basic tasks needed to present defense without help of counsel).

The defendant's request for self-representation must be a knowing, voluntary, unequivocal, and timely assertion of that right. *People v Scott* (2001) 91 CA4th 1197, 1203–1206, 111 CR2d 318 (untimely and equivocal request is properly denied). See also *People v Lynch* (2010) 50 C4th 693, 724, 114 CR3d 63, overruled on other grounds in 52 C4th 610, 620–643 (trial court may consider totality of circumstances in determining whether defendant's pretrial motion for self-representation is timely). A defendant is entitled to exercise this right if he or she is mentally competent, literate, fully informed of his or her right to counsel, and understands the dangers of self-representation. *People v Silfa* (2001) 88 CA4th 1311, 1322–1323, 106 CR2d 761 (judge may not determine defendant's competence to waive counsel by evaluating defendant's ability to act as his or her own attorney). See *People v Dent* (2003) 30 C4th 213, 217–222, 132 CR2d 527 (judge committed reversible error by denying defendant's request for self-representation on improper basis, *i.e.*, because it was a death penalty murder trial); *People v Carlisle* (2001) 86 CA4th 1382, 1385, 103 CR2d 919 (judge committed reversible error by denying defendant's repeated requests for self-representation; defendant wanted to discharge defense counsel who had been appointed to represent him at preliminary hearing and, when denied *Marsden* request for appointment of substitute counsel, requested right to represent himself); *Moon v Superior Court* (2005) 134 CA4th 1521, 1530–1531, 36 CR3d 854 (fact that defendant's unequivocal request to represent himself was made after preliminary hearing had started did not make it disruptive or untimely; denial of request was denial of substantial right and grounds for setting aside information).

The judge must make the defendant aware of the dangers and disadvantages of self-representation, *e.g.*, the defendant cannot rely on the judge to provide personal instruction on courtroom procedure, to provide assistance that would normally be provided by counsel, or to provide an advisement of any right, including the privilege against compelled self-incrimination. *People v Barnum* (2003) 29 C4th 1210, 1220–1221, 1226, 131 CR2d 499; *People v Lawley*, *supra*, 27 C4th at 142 (adequate admonition in death penalty case of risks of self-representation, including

advisement of limited role of advisory counsel). See *People v Koontz*, *supra*, 27 C4th at 1063–1069 (judge is not required to conduct a competency hearing before granting defendant's request for self-representation, when defendant does not lack either an understanding of the nature of the proceedings or the ability to conduct his or her own defense, but rather lacks legal training common to most pro per defendants). See also *People v Lopez* (1977) 71 CA3d 568, 572–574, 138 CR 36 (suggested advisements and inquiries to ensure clear record of defendant's knowing and voluntary waiver of counsel); *People v Burgener* (2009) 46 C4th 231, 243, 92 CR3d 883 (defendant's waiver of counsel was not knowing and intelligent because he was not made aware of dangers and disadvantages of self-representation when trial court failed to advise him that district attorney would be both experienced and prepared, that defendant would receive no special consideration or assistance from court and would be treated like any other attorney, that he would have no right to standby or advisory counsel, or that he would be barred from appealing adequacy of his representation). On the issues that the judge must consider when the defendant requests self-representation, see discussion in California Judges Benchguide 54: *Right to Counsel Issues* §§54.4–54.17 (Cal CJER).

Forfeiture of right to counsel. A defendant may forfeit the right to counsel by a course of serious misconduct towards counsel demonstrating that lesser measures to control the defendant, such as warnings or physical restraint, are insufficient to protect counsel. A proceeding for forfeiture of counsel, however, calls for considerable due process procedural protections, including the right to produce evidence and to cross-examine adverse witnesses, the right to appear by counsel, and the right to an impartial decision-maker. Before declaring a forfeiture of the right to counsel, the judge should (1) give explicit warnings that if the defendant persists in the misconduct, the defendant will forfeit the right to counsel and have to proceed in pro per, (2) ensure that the defendant is aware of the dangers of self-representation, (3) make a clear ruling of forfeiture, and (4) provide factual findings based on clear and convincing evidence to support the ruling and set forth these findings on the record. *King v Superior Court* (2003) 107 CA4th 929, 132 CR2d 585.

(3) [§92.12] Time To Obtain Counsel

If the defendant desires an attorney, the court must allow the defendant a reasonable time to obtain one. The court may postpone the preliminary hearing for not less than two nor more than five days to allow the defendant to secure representation. Pen C §860.

Even in the absence of a specific statute, the constitutional rights to counsel and due process require that a defendant be given a reasonable continuance to secure counsel of his or her choice if the defendant shows that he or she is financially able to secure counsel. *People v Courts* (1985) 37 C3d 784, 789–796, 210 CR 193. To make this determination, the court may ask the defendant to submit a financial statement. Pen C §987(c). The court may also ask the defendant to file a financial statement to determine whether the defendant qualifies for the services of the public defender. Govt C §27707.

(4) [§92.13] Appointing Public Defender

If the defendant desires, but cannot afford, an attorney, the court must appoint one. Pen C §987(a)–(b); *People v Lara* (2001) 86 CA4th 139, 150, 103 CR2d 201. The court must first attempt to appoint the public defender, and may appoint private counsel only if no public defender is available or the public defender is unable to represent the defendant because of a conflict of interest. See Pen C §987.2(a); Govt C §27706; *People v Hall* (1978) 87 CA3d 125, 133–134, 150 CR 628. See also *People v Lopez* (2008) 168 CA4th 801, 808, 85 CR3d 675 (there is no conflict of interest when public defender represents defendant in case where another public defender from same office previously represented prosecution witness if the two public defenders do not speak with each other, the public defender representing the defendant does not read the witness's file, and no one in the office has received anything confidential from the witness). If the court has granted the defendant's request for self-representation, the court may not appoint the public defender to act as standby counsel. *Dreiling v Superior Court* (2000) 86 CA4th 380, 382, 103 CR2d 70.

Appointment of attorney other than attorney requested by defendant. The constitutional and statutory guarantees of the assistance of counsel are not violated by the appointment of an attorney other than the one the defendant has requested. It is not an abuse of discretion for the court to appoint an attorney other than that requested by the defendant when the attorney requested by the defendant has no particular familiarity with the case. See *People v Horton* (1995) 11 C4th 1068, 1098–1099, 47 CR2d 516; *People v Robinson* (1997) 53 CA4th 270, 277–278, 61 CR2d 587.

Multiple defendants. If multiple indigent defendants appear without counsel at the preliminary hearing, the court must appoint separate counsel for each defendant. *People v Mroczko* (1983) 35 C3d 86, 115–116, 197 CR 52. See Simons, Preliminary Examinations §2.1.2.

Appointment of more than one attorney. A defendant's right to a court-appointed attorney does not include the right to require the court to

appoint more than one attorney, except when the first appointed attorney is not adequately representing the defendant. *People v Lara, supra,* 86 CA4th at 150.

Determination of counsel's readiness to proceed. Before making the appointment of the public defender or private defense counsel, the court must determine that counsel will be ready to proceed with the preliminary hearing and trial within the prescribed statutory time limits except in unusual instances in which the court finds that, because of the nature of the case, counsel cannot reasonably be expected to be ready within the prescribed period. Pen C §987.05. In such an instance, the court must set a reasonable time for preparation. Pen C §987.05. In making the determination, the court may not consider counsel's convenience, calendar conflicts, or other business. The court may allow counsel a reasonable time to become familiar with the case in order to determine whether counsel can be ready. Pen C §987.05. If counsel represents that he or she will be ready for the preliminary hearing and, without good cause, is not ready on the date set, the court may relieve counsel from the case and impose sanctions on counsel. Pen C §987.05. These sanctions may include finding counsel in contempt of court, imposing a fine, or denying public funds as compensation for counsel's services. Pen C §987.05. Both the prosecutor and defense counsel have a right to present evidence and argument as to a reasonable length of time for preparation and on any reasons why counsel could not be prepared in the set time. Pen C §987.05. For further discussion, see Simons, Preliminary Examinations §2.1.6.

Notice about repayment of costs. Before appointing counsel to represent an indigent defendant, the court must give the defendant notice that, after a hearing, the court may order the defendant to pay all or a portion of the cost of counsel if the court determines that the defendant has the ability to do so. Pen C §987.8(f). This notice must inform the defendant that such an order has the same force and effect as a judgment in a civil action, and is subject to enforcement against the defendant's property in the same manner as any other money judgment. Pen C §987.8(f); *People v Smith* (2000) 81 CA4th 630, 637–638, 96 CR2d 856 (adequacy of notice).

(5) [§92.14] Right to Counsel Prevails Over Ten-Day Requirement

The defendant's right to effective assistance of counsel prevails over the defendant's right under Pen C §859b to a preliminary hearing within ten days. See *People v Kowalski* (1987) 196 CA3d 174, 179, 242 CR 32; discussion in §§92.36, 92.40.

(6) [§92.15] Self Represented Litigant's Request For Counsel At Hearing

When the defendant has waived the right to counsel at the arraignment, but requests the appointment of counsel at the preliminary hearing, it is within the magistrate's discretion to appoint counsel, but the magistrate need not do so. *People v Boulware* (1993) 20 CA4th 1753, 1756–1757, 25 CR2d 381. A defendant does not have a constitutional right to change his or her mind regarding representation on the day of the preliminary hearing, without advance notice to the prosecution, whose witnesses are at the hearing ready to testify. 20 CA4th at 1756.

(7) [§92.16] *Marsden* Motions

It is within the magistrate's discretion to grant or deny a defendant's *Marsden* motion made at the preliminary hearing to replace his or her appointed counsel. *People v Smith* (2003) 30 C4th 581, 134 CR2d 1; *People v Silva* (2001) 25 C4th 345, 366–367, 106 CR2d 93 (judge made sufficient inquiry into defendant's reasons for requesting substitute counsel before denying request); *People v Barnett* (1998) 17 C4th 1044, 1083–1087, 74 CR2d 121. See *People v Marsden* (1970) 2 C3d 118, 123, 84 CR 156. The magistrate must permit the defendant to explain the basis of his or her contention of inadequate representation and to relate specific instances of the attorney's inadequate performance.

A defendant is entitled to relief if the appointed attorney is not providing adequate representation or the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. *People v Smith*, *supra*, 30 C4th at 604; *People v Barnett*, *supra*, 17 C4th at 1085. Denial of the defendant's request is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would substantially impair the defendant's right to assistance of counsel. 17 C4th at 1085. The magistrate need not conclude that an irreconcilable conflict exists if the defendant has not tried to resolve any disputes with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness. *People v Smith*, *supra*, at 606. Disagreement concerning tactics, by itself, is insufficient to compel replacement of appointed counsel. 30 C4th at 606. To the extent there is a credibility question between the defendant and counsel, the magistrate is entitled to accept counsel's explanation. *People v Jones* (2003) 29 C4th 1229, 1245–1246, 131 CR2d 468 (if defendant's claimed lack of trust in or inability to get along with appointed counsel were sufficient to compel appointment of substitute counsel, defendants would effectively have veto power over any appointment and could obtain appointment of their preferred attorneys by process of elimination, which is not the law). A

defendant may not force substitution of counsel by his or her own contentious conduct; instead, the defendant must show what counsel has done to cause a breakdown of their relationship. *People v Smith, supra*, 30 C4th at 606; *People v Michaels* (2002) 28 C4th 486, 523, 122 CR2d 285 (defendant cannot simply refuse to cooperate with appointed counsel and thereby compel judge to remove that attorney). The magistrate is not required to appoint independent counsel to assist the defendant in making a motion to substitute counsel. *People v Hines* (1997) 15 C4th 997, 1024–1025, 64 CR2d 594.

A defendant's request for removal of counsel, which states that if counsel is not removed the defendant wants to represent himself or herself, is a conditional, not an equivocal request for self-representation; thus, the magistrate may properly require the defendant to elect whether to proceed with existing counsel or represent himself or herself. *People v Michaels, supra,* 28 C4th at 523–524. When denying a defendant's request at the preliminary hearing for substitution of counsel, it is not an abuse of discretion for the magistrate to also deny the defendant's request to represent himself or herself when the request is not unequivocal. *People v Barnett, supra,* 17 C4th at 1087–1088.

g. [§92.17] Appointing Interpreter

If the defendant is unable to understand English, the court must continue the preliminary hearing until an interpreter can be appointed. Cal Const art I, §14 (defendant unable to understand English has right to interpreter throughout criminal proceedings); *People v Superior Court* (Almaraz) (2001) 89 CA4th 1353, 1357–1359, 107 CR2d 903 (describing right to interpreter under constitution, statutes, and case law); *People v Carreon* (1984) 151 CA3d 559, 567, 198 CR 843 (court must appoint interpreter on showing of need). The court must appoint a separate interpreter for each codefendant who is unable to understand English. *People v Rodriguez* (1986) 42 C3d 1005, 1013–1016, 232 CR 132.

The court must also appoint an interpreter for any witness who is unable to understand English. Evid C §752. The court may not assign the defendant's interpreter to also interpret for a witness; separate interpreters are required. *People v Aguilar* (1984) 35 C3d 785, 793, 200 CR 908.

Standard 2.10 of the Standards of Judicial Administration sets forth the standards and the procedure for determining the need for a court interpreter, including specific questions the court should ask the defendant or witness. After examining the defendant or witness, the court should state its conclusion on the record. The case file should be clearly marked to ensure that an interpreter will be present when needed in the proceedings. Cal Rules of Ct, Standards of J Admin 2.10(d). For good

cause, the court should authorize a preappearance interview between the interpreter and the party or witness. Cal Rules of Ct, Standards of J Admin 2.10(e). Standard 2.11 contains instructions the court should give the interpreter and counsel.

Any person who interprets in a court proceeding using a language designated by the Judicial Council must be certified, unless good cause is shown. Govt C §68561(a). The procedure for selecting a noncertified interpreter in a criminal case is set forth in Cal Rules of Ct 2.893. A judge's failure to follow this procedure in selecting an interpreter for the defendant does not violate the defendant's constitutional right to an interpreter, because this right encompasses only a right to a competent interpreter, not a right to a certified interpreter. *People v Superior Court* (Almaraz), *supra*, 89 CA4th at 1359–1360. Improper procedures in the use of an interpreter do not rise to the level of a constitutional violation unless they deprive the defendant of a fair trial. 89 CA4th at 1360.

California Rules of Court 2.890 sets forth various requirements imposed on interpreters.

For further discussion, see Simons, Preliminary Examinations §§2.2.8–2.2.11.

h. [§92.18] Considering Diversion or Deferred Entry of Judgment

Certain defendants may be eligible for diversion or deferred entry of judgment. Pen C §§1001.52(a) (misdemeanor diversion), 1001.72(a) (parental diversion), 1001.22 (cognitive developmental disability diversion), 1000.1(b) (drug deferred entry of judgment). If the defendant consents, the case should be referred to the probation department for an investigation and report and a preliminary hearing is not required. Pen C §§1000.1(b), 1001.52(a), 1001.72(a), 1001.22. In addition, the court should inform the defendant that statements made to the probation officer may not be used against the defendant in any subsequent criminal action or proceeding. Pen C §§1000.1(c) (drug deferred entry of judgment), 1001.5, 1001.52(b) (misdemeanor diversion), 1001.72(b) (parental diversion), 1001.24 (cognitive developmental disability diversion).

2. [§92.19] Handling Plea Bargains

At the prehearing conference, most judges ask whether counsel have discussed a negotiated plea. Judges generally take an active role in urging counsel to attempt to resolve the case by negotiating a plea.

If a plea negotiation is offered and accepted that includes a reduction of a felony to a misdemeanor charge, judges frequently arraign the defendant and impose a misdemeanor sentence immediately on acceptance

of the plea, after obtaining the defendant's waiver of the Pen C §1449 time limits.

Sometimes a plea is not accepted until the time of the preliminary hearing. In that case, judges may hear and investigate the negotiated plea rather than conduct a preliminary hearing. See sample script at §92.113.

A felony plea bargain must be made on the record. Pen C §1192.6; *People v West* (1970) 3 C3d 595, 610, 91 CR 385. If the defendant is eligible for probation, the judge must refer the case to the probation officer for a report under Pen C §1203 before sentencing. Pen C §1191.

☛ JUDICIAL TIP: Be aware of your court's procedures for handling Proposition 36 cases when taking pleas. A case that involves a nonviolent felony and a non-drug-related misdemeanor may not have been a Proposition 36 case initially, but if the misdemeanor is dropped as part of the plea bargain, the defendant may become eligible for Proposition 36 treatment. See Pen C §§1210, 1210.1.

a. Requirements for Approval of Plea

(1) [§92.20] Advisement and Waiver of Rights

A defendant's guilty plea is valid only if it is voluntarily and knowingly made. *Boykin v Alabama* (1969) 395 US 238, 242, 89 S Ct 1709, 23 L Ed 2d 274. Before accepting the plea or an admission of charged enhancements, the trial court must expressly advise the defendant and obtain his or her waiver of the constitutional rights to trial by jury, to confront and cross-examine witnesses, and against self-incrimination. The record must show explicit advisements and waivers of these constitutional rights. 395 US at 243; *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577; see *People v Howard* (1992) 1 C4th 1132, 1178–1179, 5 CR2d 268.

There is no specific formula for advising a defendant of his or her constitutional rights. *People v Wharton* (1991) 53 C3d 522, 582, 280 CR 631. All that is required is that the record must show by direct evidence, in light of the totality of circumstances, that the defendant was fully aware of these rights. *People v Murillo* (1995) 39 CA4th 1298, 1304, 46 CR2d 403. However, it is best for the court to ensure that there is an adequate record for appeal and to protect the validity of a defendant's guilty plea by making its advisements, making sure that defendant understands his or her rights, and ensuring that waivers are as complete and explicit as possible. 39 CA4th at 1304.

(2) [§92.21] Advisement of Direct Consequences of Plea

The record must demonstrate that the defendant understands the nature of the charges and the direct consequences of his or her plea or

admission. *People v Walker* (1991) 54 C3d 1013, 1022, 1 CR2d 902. This requirement extends only to the primary and direct penal consequences of the imminent conviction. It is not constitutionally required, but is merely a judicially declared rule of criminal procedure. *People v Barella* (1999) 20 C4th 261, 266, 84 CR2d 248.

A consequence is "direct" if it has a definite, immediate, and largely automatic effect on the range of the defendant's punishment. *People v Moore* (1998) 69 CA4th 626, 630, 81 CR2d 658. Direct consequences include the imposition of victim restitution, probation ineligibility, and registration as a sex offender. A consequence is "collateral" if it does not inexorably follow from a conviction of the offense involved in the plea, *e.g.,* the possibility of enhanced punishment in the event of a future conviction, the possibility of probation revocation in another case, or limitations on the ability to earn conduct and work credits while in prison. 69 CA4th at 630–633 (court was not required to advise defendant that he might eventually be subject to additional confinement under Sexually Violent Predator Act (Welf & I C §§6600 et seq), because any such confinement was collateral, not direct or penal, consequence of plea). See also *People v Aguirre* (2011) 199 CA4th 525, 528, 131 CR3d 785 (trial court need not advise defendant that plea might be used against him or her in federal proceedings, as that is collateral consequence of plea).

For a comprehensive list of direct consequences, see California Judges Benchguide 91: *Felony Arraignment and Pleas* §91.27 (Cal CJER).

(3) [§92.22] Factual Basis

Before accepting a negotiated plea of guilty or no contest, the court must determine that there is a factual basis for the plea. Pen C §1192.5; *People v Holmes* (2004) 32 C4th 432, 438–442, 9 CR3d 678. The factual basis required by Pen C §1192.5 does not require more than establishing a prima facie factual basis for the charge. The court need not interrogate the defendant about possible defenses to the charge, nor does it have to be convinced of the defendant's guilt. 32 C4th at 441.

In order to comply with Pen C §1192.5, the court must garner information regarding the factual basis either from the defendant or defense counsel. 32 C4th at 442. If the court decides to question defendant regarding the factual basis, the judge may develop the factual basis for the plea on the record by having the defendant describe the conduct that gave rise to the charge, or questioning the defendant regarding the detailed factual basis described in the complaint or written plea agreement. If the court questions defense counsel regarding the factual basis, counsel may stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, proba-

tion report, grand jury transcript, or written plea form. 32 C4th at 442. The practice of many courts is to ask the prosecutor to recite a brief statement of facts, which should include all the elements of the crime, including a reference to the police report, then ask defense counsel to agree to the facts as stated by the district attorney and as contained in the police report. Trial counsel's bare stipulation that there is a factual basis, without reference to any documents in the record containing factual allegations, is insufficient to establish an adequate factual basis for the defendant's plea. *People v Willard* (2007) 154 CA4th 1329, 1333–1335, 65 CR3d 488 (court held that *Holmes, supra*, makes clear that there must be some reference to a factual source to support the essential elements of the crime).

☛ JUDICIAL TIP: Although *People v Holmes*, *supra*, allows the factual basis to be established from reference to the police report alone, the better practice is to have the record reflect an affirmative statement made in the presence of the defendant and agreed to by counsel. Such a discussion on the record may help the court rule on a subsequent motion to withdraw the plea based on a lack of understanding of the charges.

(4) [§92.23] Additional Waivers

Arbuckle waiver. When a judge accepts a negotiated plea and retains sentencing discretion under the agreement, an implied term of the bargain is that sentence will be imposed by that judge. If the sentence is to be imposed by another judge, the court should ask the defendant or defense counsel to enter an *Arbuckle* waiver at the time of plea. If the defendant's case is assigned to a different judge for sentencing and an *Arbuckle* waiver was not given, the defendant may withdraw the guilty plea. *People v Arbuckle* (1978) 22 C3d 749, 756–757, 150 CR 778.

The *Arbuckle* rule does not apply when the judge's unavailability arises from circumstances clearly beyond the power of the court, such as the judge's resignation, retirement, illness, or death. *People v Jackson* (1987) 193 CA3d 393, 403, 238 CR 327 (illness); *People v Dunn* (1986) 176 CA3d 572, 575, 222 CR 273 (retirement); *People v Watson* (1982) 129 CA3d 5, 7, 180 CR 759 (death).

Harvey waiver. Also implicit in a plea bargain is the understanding that the defendant will not suffer any adverse sentencing consequences by reasons of facts underlying, and solely pertaining to any dismissed counts or cases that are not transactionally related to the crime(s) for which the defendant is being sentenced. If the court will be considering such counts or cases for the purposes of determining restitution or punishment, the court should secure the defendant's consent to do so (*Harvey* waiver).

People v Harvey (1979) 25 C3d 754, 757–759, 159 CR 696; *People v Beck* (1993) 17 CA4th 209, 215, 21 CR2d 250. A waiver is not required if the dismissed counts are transactionally related. *People v Harvey, supra*, 25 C3d at 758; *People v Bradford* (1995) 38 CA4th 1733, 1737–1739, 45 CR2d 757. See also *People v Beagle* (2004) 125 CA4th 415, 420–421, 22 CR3d 757, and *People v Martin* (2010) 51 C4th 75, 82, 119 CR3d 99 (court may not impose a probation condition based on dismissed charges absent *Harvey* waiver).

Cruz waiver. The court may ask the defendant to agree, as part of the plea agreement, that the court may withdraw its approval of the plea and impose a sentence in excess of the bargained-for-term should the defendant fail to appear for sentencing. This waiver of the right to withdraw a plea under Pen C §1192.5 should a court disapprove a plea bargain is called a "*Cruz* waiver." *People v Cruz* (1988) 44 C3d 1247, 1254 n5, 246 CR 1; *People v Masloski* (2001) 25 C4th 1212, 1216–1223, 108 CR2d 484. Absent such a provision, a defendant does not lose the protection of Pen C §1192.5 by failing to appear for sentencing. *People v Cruz, supra*, 44 C3d at 1249. The failure to appear does not breach the terms of the plea agreement, but merely constitutes a separate offense of failure to appear. See Pen C §§1320, 1320.5; 44 C3d at 1253.

b. [§92.24] Guilty Plea Without Counsel

Noncapital cases. A defendant who has exercised his or her right to self-representation in a noncapital case may validly enter into a negotiated plea. *People v Ingels* (1989) 216 CA3d 1303, 1306–1308, 265 CR 521. Although Pen C §859a requires that defense counsel be present in order for the defendant to plead guilty at the preliminary hearing, this requirement is unconstitutional with respect to a defendant who has elected to represent himself or herself. *People v Ingels, supra*.

Capital Cases. Although a capital case defendant has the right to self-representation as in other cases, he or she may not enter a guilty plea unless represented by counsel and counsel consents to the plea. Pen C §1018. See *People v Chadd* (1981) 28 C3d 739, 750–754, 170 CR 798 (Pen C §1018 does not run afoul of *Faretta*).

c. [§92.25] After Plea Has Been Approved

Required advisements. If the judge approves the negotiated plea, the judge must inform the defendant before taking the plea that (Pen C §1192.5)

- The judge's approval is not binding.

- The judge may, at the time of the hearing on the application for probation or pronouncement of judgment, withdraw the judge's approval of the plea in light of further consideration of the matter.
- In such a case, the defendant has the right to withdraw the plea if the defendant desires to do so.

Sex offender registration requirement. If the plea is accepted by the prosecutor in open court and is approved by the judge, the defendant cannot be sentenced on the plea to a punishment more severe than that specified in the plea. Pen C §1192.5; *People v Walker* (1991) 54 C3d 1013, 1024, 1 CR2d 902. However, the California Supreme Court has held that the sex offender registration requirement is not a permissible subject of plea negotiation because such registration is a statutorily mandated element of punishment for the underlying offense. Thus, a plea bargain in such a case is not violated by imposing the registration requirement, even if the court has not advised the defendant of the requirement before entering the plea. *People v McClellan* (1993) 6 C4th 367, 379–381, 24 CR2d 739. However, when a defendant agrees to a plea bargain under which the defendant pleads guilty to an offense that is not specifically included in the sex offender registration statute and the registration requirement is not included in the bargain, the sentencing court may not require the defendant to register based on the underlying facts of the offense. *People v Olea* (1997) 59 CA4th 1289, 1296–1299, 69 CR2d 722. The court need not strike the requirement, however, but may consider whether the punishment under the plea agreement is adequate and, if not, offer the defendant the option of withdrawing the plea or accepting a new bargain that includes the registration requirement. 59 CA4th at 1298–1299.

Sentencing. If the plea is accepted by the prosecutor in open court and is approved by the judge, the defendant cannot be sentenced on the plea to a punishment that is *less* severe than that specified in the plea, absent the prosecutor's agreement. *People v Tang* (1997) 54 CA4th 669, 680, 62 CR2d 876; *People v Superior Court* (Gifford) (1997) 53 CA4th 1333, 1336–1339, 62 CR2d 220 (judge imposed probation instead of three-year prison term set forth in plea). When a judge accepts the terms of a plea bargain, the judge lacks jurisdiction to alter those terms so that they become more favorable to the defendant. 53 CA4th at 1337–1338. The judge has broad discretion, however, to withdraw his or her prior approval of the negotiated plea before sentence is imposed. Pen C §1192.5; 53 CA4th at 1338–1339.

Under Pen C §1192.5, if a plea agreement is accepted by the prosecution and approved by the judge, the defendant cannot be sentenced on the plea to a punishment *more* severe than that specified in the plea. If

the judge subsequently withdraws approval of the plea agreement, the defendant must be permitted to withdraw the plea if he or she wishes to do so. Pen C §1192.5; *People v Masloski* (2001) 25 C4th 1212, 1217, 108 CR2d 484.

Unless it specifies otherwise, a plea agreement that provides for a *maximum* sentence inherently reserves the parties' right to a sentencing proceeding in which (1) they may litigate the appropriate individualized sentence choice within the constraints of the bargain and the court's lawful discretion, and (2) appellate challenges to the judge's sentencing decision, otherwise available, are retained. Such a challenge does not attack the validity of the plea, and a probable cause certificate under Pen C §1237.5 is therefore not required in order to appeal. *People v Buttram* (2003) 30 C4th 773, 777, 134 CR2d 571 (this type of plea agreement contemplates that judge will choose from among range of permissible sentences within maximum, and that abuses of this discretionary sentencing authority will be reviewable on appeal).

d. [§92.26] Plea Not Approved

If the plea is not accepted by the prosecutor and approved by the judge, the plea is considered withdrawn, and the defendant may then enter any plea. Pen C §1192.5. A plea that is withdrawn or considered withdrawn may not be received in evidence in any criminal or civil proceeding, or any special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals. Pen C §1192.5.

e. [§92.27] Limitation on Pleas

Penal Code §§1192.5 and 1192.7 specify the offenses that may not be plea bargained. In a "three strikes" case, the prosecutor may not make any plea bargain to strike or seek the dismissal of prior felony convictions. Pen C §§667(g), 1170.12(e). However, the prosecutor may move to dismiss or strike a prior felony in furtherance of justice or if there is insufficient evidence to prove the prior. If the judge is satisfied that there is insufficient evidence to prove the prior, the judge may dismiss or strike the allegations. Pen C §§667(f)(2), 1170.12(d)(2).

3. [§92.28] Waiving Right to Preliminary Hearing

A defendant, with the concurrence of the prosecutor, may waive the right to a preliminary hearing either by pleading guilty or by simply waiving the right to a preliminary hearing. See Pen C §§859b, 860. A defendant may waive the hearing without entering a guilty plea only if represented by counsel. Pen C §860. This requirement may be

unconstitutional with respect to a defendant who is representing himself or herself. See *People v Ingels* (1989) 216 CA3d 1303, 1306, 265 CR 521.

a. [§92.29] Waiver Must Be Personal

The defendant must personally waive the right to a preliminary hearing; a waiver by counsel is insufficient. See Pen C §§859b(a), 860; *People v Kowalski* (1987) 196 CA3d 174, 178, 242 CR 32. Any waiver of the right to a preliminary hearing must also be voluntary. See Pen C §859b; *In re Watson* (1972) 6 C3d 831, 839–841, 100 CR 720. Before taking a defendant's waiver, many judges ask the defendant if any promises or threats have been made to induce the defendant to give up the right to a preliminary hearing. They make an express finding that the waiver was personal, voluntary, and knowing.

b. [§92.30] Advise of Rights Before Waiver

Before taking the defendant's waiver, the magistrate should advise the defendant of the right to

- A preliminary hearing. The magistrate should carefully explain the nature of the hearing and what will follow in court.
- Require the prosecutor to prove that there is probable cause to believe the defendant is guilty of all charges in the complaint.
- See and hear any prosecution witnesses testifying in open court and to have defense counsel cross-examine them.
- Present a defense and to testify on his or her own behalf.

After explaining each right, most judges ask the defendant if he or she understands the right and if he or she waives that right. *Boykin v Alabama* (1969) 395 US 238, 89 S Ct 1709, 23 L Ed 2d 274; *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577; *People v Wright* (1987) 43 C3d 487, 491, 233 CR 69. For a script, see §92.111.

c. [§92.31] Waiver Without Plea of Guilty

After the waiver is taken without entering a plea of guilty, the magistrate must make an order holding the defendant to answer. Pen C §860. See §92.85. A reporter's transcript of the waiver should be prepared and submitted to the Superior Court in the same manner as if there has been a preliminary hearing. See §92.48. The magistrate should also hear any bail or OR motion made by the defendant. See §§92.102–92.104. The prosecutor must file an information with the court within 15 days, although the defendant may waive the time for arraignment. Pen C §§860, 1382. In some courts, the magistrate may conduct the arraignment, discuss

waivers of times with the parties, take the defendant's plea, and discuss trial setting with counsel.

d. [§92.32] Waiver by Pleading Guilty or No Contest

A defendant charged with a felony may waive a preliminary hearing by pleading guilty or no contest. Pen C §859a. The procedure is as follows (Pen C §859a):

- On the appearance of defense counsel, the magistrate must read the complaint to the defendant and ask the defendant whether he or she pleads guilty or not guilty to the charged offense, and to any previous conviction that is charged.
- When defense counsel is present, the defendant may plead guilty to the charged offense, or, with the consent of the magistrate and the prosecutor, may plead no contest. The defendant may also plead guilty or no contest to any lesser included charge, to an attempt to commit the charged offense, or to a previous conviction. See §§92.20–92.23 for discussion or requirements of guilty pleas.
- The magistrate may then fix bail, and if the defendant fails to deposit bail, may commit the defendant into custody.
- The magistrate must certify the case for judgment and sentencing. In some courts, the magistrate may set the sentencing date in his or her own department depending on local practice. The magistrate may also refer the case to the probation officer if the defendant is eligible for probation. See Pen C §1191; Cal Rules of Ct 4.114.

Although Pen C §859a requires that defense counsel be present in order for the defendant to plead guilty at the preliminary hearing, this requirement is unconstitutional with respect to a defendant who is representing himself or herself. See *People v Ingels* (1989) 216 CA3d 1303, 1306, 265 CR 521.

e. [§92.33] Rejection of Defendant's Waiver

Even when the defendant wants to waive the right to a preliminary hearing, the magistrate or the prosecutor may object and require a preliminary hearing. Pen C §860.

f. [§92.34] Rules To Dispose of Cases Before Preliminary Hearing

Superior courts with more than three judges must in cooperation with the District Attorney and defense bar adopt procedures to facilitate disposition of cases before the preliminary hearing. Cal Rules of Ct 10.953(a). These procedures may include early, voluntary, and informal discovery, and the use of superior court judges as magistrates to conduct readiness conferences before the preliminary hearing and to assist in the early disposition of cases. Cal Rules of Ct 10.953(a). Pleas of guilty or no contest resulting from these procedures are disposed of under Cal Rules of Ct 4.114, discussed in §92.32. Cal Rules of Ct 10.953(b).

4. Time Limitations

a. [§92.35] Ten-Day and 60-Day Time Limits

The preliminary hearing must be held not less than two nor more than ten court days from the date the defendant is arraigned or enters a plea, whichever is later. Pen C §859b. Weekends and holidays are not counted in computing the ten-day period. CC §11; Govt C §6706. The magistrate sets the time for the preliminary hearing when the defendant appears for arraignment unless one of the following occurs (Pen C §859b):

- The defendants waives the right to a preliminary hearing and chooses to plead guilty as specified in Pen C §859a (see §92.32).
- The defendant and the prosecution waive the right to a preliminary hearing at the earliest possible time. On taking the defendant's waiver, see §§92.28–92.34.
- The magistrate grants a continuance of the preliminary hearing for good cause. On determining "good cause," see §92.36.

At the arraignment, the magistrate must also issue subpoenas for witnesses within the state, whose appearance at the preliminary hearing is required by either the prosecution or the defense. Pen C §859b.

Even when the defendant has waived the ten-day time limit or the hearing has been continued for good cause, the hearing must be held within 60 calendar days from the date of the arraignment or plea, unless the defendant personally waives the right to a preliminary hearing within the 60 calendar days. Pen C §859b; see §92.39.

b. Continuing Hearing for Good Cause

(1) [§92.36] Determining Good Cause

In general, good cause for delaying a preliminary hearing beyond ten court days is the same as good cause for delaying a trial under Pen C §1050. Pen C §859b. Good cause has been found when:

- The delay benefits the defendant by preserving a constitutional or other right. *People v Kowalski* (1987) 196 CA3d 174, 179, 242 CR 32 (additional time needed for defendant to secure counsel). See *People v Snow* (2003) 30 C4th 43, 70, 132 CR2d 271 (court may not exercise its discretion over continuances so as to deprive defendant or defense counsel of reasonable opportunity to prepare).
- The delay is at the request and for the benefit of a codefendant. *In re Samano* (1995) 31 CA4th 984, 993, 37 CR2d 491.
- A continuance is necessary because of the defendant's conduct. *People v Johnson* (1980) 26 C3d 557, 570, 162 CR 431.
- A delay is necessary because of unforeseen circumstances, such as the unexpected illness or unavailability of counsel or subpoenaed witnesses. 26 C3d at 570. See *People v Alvarez* (1989) 208 CA3d 567, 577–578, 256 CR 289 (unavailability of prosecution's criminologist).
- The defendant is absent at the commencement of the preliminary hearing because of his or her imprisonment on unrelated charges. *Blake v Superior Court* (1980) 108 CA3d 244, 247–250, 166 CR 470.
- Substituted defense counsel needs time to prepare for a complex preliminary hearing. *People v Kowalski*, *supra*, 196 CA3d at 179.
- A psychiatric evaluation to determine the defendant's competence to represent himself or herself cannot be obtained within the ten-day time limit. See *Curry v Superior Court* (1977) 75 CA3d 221, 225–226, 141 CR 884.

Penal Code §859b specifically provides that the preliminary hearing may be continued for up to three court days in cases involving a violation of Pen C §11165.1 (sexual abuse) or Pen C §11165.6 (child abuse or neglect), when the prosecutor assigned to the case is unavailable because he or she has another trial, preliminary hearing, or motion to suppress in progress.

(2) [§92.37] Release of Defendant When Good Cause Is Shown

When there is good cause for delaying the preliminary hearing and the defendant has been in custody for ten or more court days after the arraignment or plea solely on the complaint for which the preliminary hearing is to be conducted, the defendant must be released from custody on his or her own recognizance**,** unless one of the following exceptions applies (Pen C §859b; *People v Standish* (2006) 38 C4th 858, 869–870, 43 CR3d 785):

- The defendant has requested that the hearing be set beyond the ten-day period.
- The defendant is charged with a capital offense in a case in which the proof is evident and the presumption of guilt is great. For a discussion of factors to consider, see Simons, Preliminary Examinations §1.1.6.
- A necessary witness is unavailable for the hearing because of the defendant's actions.
- Defense counsel is ill.
- Counsel is unexpectedly engaged in a jury trial. This condition applies only to private defense counsel. See *People v Johnson* (1980) 26 C3d 557, 575, 162 CR 431.
- An unforeseen conflict of interest has arisen that requires the appointment of new counsel.

When OR release is granted under Pen C §859b, the defendant must agree to be bound by reasonable conditions and to appear at future hearings as provided in Pen C §1318. Pen C §859b; *People v Standish*, *supra*, 38 C4th at 869, 871.

A defendant's remedy for a failure to release is to file a petition for writ of habeas corpus or other extraordinary writ just as a defendant may challenge the amount set as bail. Habeas corpus proceedings can be quickly resolved, and the defendant may be released pending a decision. 38 C4th at 887.

But the failure to release within the mandatory time frame is not an error of constitutional dimension that would generally justify the court in setting aside the information. The court may, however, set aside the information based on such an error if it determines that the error reasonably might have affected the outcome of the preliminary hearing. 38 C4th at 882.

When a defendant has been granted OR release under Pen C §859b, the release applies to a limited period between the order granting a

continuance and the conclusion of the preliminary hearing. OR may be revoked after the defendant is held to answer or after the information is filed. 38 C4th at 883.

The limitations on OR release contained in Pen C §§1319 and 1319.5 (see §92.104) do not apply to Pen C §859b OR releases. 38 C4th at 870–871.

Codefendants. In-custody codefendants who object to the continuance of their preliminary hearing are nevertheless treated as having requested the continuance when the request is made by other codefendants and good cause is found. *In re Samano* (1995) 31 CA4th 984, 993, 37 CR2d 491. The objection does not constitute a basis for releasing an in-custody codefendant who objects to the continuance. 31 CA4th at 992–993.

(3) [§92.38] No Good Cause

Absent exceptional circumstances and the three-day statutory exception noted in §92.36, good cause for continuing the preliminary hearing is not shown by the fact that the prosecutor (or the public defender) is engaged in another proceeding. See *People v Johnson* (1980) 26 C3d 557, 575, 162 CR 431. Good cause is also not shown when:

- No judge is available to conduct the preliminary hearing. 26 C3d at 570–571 (not good cause to excuse delay absent exceptional circumstances).
- The case is set for a preliminary hearing beyond the ten-day time limit because of a clerical error by court personnel. *People v Pickens* (1981) 124 CA3d 800, 804–806, 177 CR 555.
- A witness, who was not subpoenaed, fails to appear. *Cunningham v Municipal Court* (1976) 62 CA3d 153, 155–156, 133 CR 18; but see *Owens v Superior Court* (1980) 28 C3d 238, 251, 168 CR 466 (subpoena to missing witness was not enough when attempts by prosecution to locate the witness were "meager").
- The prosecutor is ill but a substitute prosecutor is available. *Kruse v Superior Court* (2008) 162 CA4th 1364, 1373–1374, 76 CR3d 664.

Failure to grant a continuance of a preliminary hearing is not error unless the defendant can demonstrate that the failure resulted in the denial of a fair trial or otherwise affected the ultimate judgment. *People v Jenkins* (2000) 22 C4th 900, 958, 95 CR2d 377.

(4) [§92.39] No Continuance Beyond 60 Days Without Personal Waiver

If the magistrate finds that the prosecution has established good cause for a continuance, the magistrate may extend the time for the preliminary hearing beyond the ten-day time limit. Pen C §859b. The magistrate may not, however, extend the time for the preliminary hearing beyond 60 calendar days from the date the defendant was arraigned or entered a plea, unless the defendant personally waives this 60-day time limit. Pen C §859b.

There is no good cause exception to the 60-day rule. A personal waiver from the defendant is required, even if the prosecutor can establish good cause for a continuance as to the defendant or codefendant. *Ramos v Superior Court* (2007) 146 CA4th 719, 729–732, 53 CR3d 189.

c. [§92.40] Obtaining Time Waivers

Personal waiver. The magistrate must take a personal waiver from the defendant of the ten-day time limit for commencing the preliminary hearing. Pen C §859b(a); *People v Kowalski* (1987) 196 CA3d 174, 178, 242 CR 32. See also *People v Love* (2005) 132 CA4th 276, 34 CR3d 6 (if defendant asserts right to preliminary hearing within ten-day limit, fails to appear, and is later arrested on bench warrant, defendant may not demand a hearing within ten-day limit again. Some judges set new preliminary hearing within ten days but may continue matter for good cause).

Defense counsel may not effectively stipulate to a waiver for the defendant. See Pen C §859b(a); Simons, Preliminary Examinations §1.1.5.

☛ JUDICIAL TIP: Sometimes attorneys will attempt to answer for the defendant in agreeing to time waivers. Judges should require the defendant to answer for him or herself on the record.

Application of 60-day time limit. A waiver of the right to a preliminary hearing within ten days waives the right to have it held at the "earliest possible time." Pen C §859b; *People v Alvarez* (1989) 208 CA3d 567, 573–574, 256 CR 289. The applicable time limit then becomes the 60-calendar-day time limit of Pen C §859b(b). When a defendant has waived the right to a preliminary hearing within the ten-day time limit, the court is not required to take an additional waiver from the defendant if the hearing is continued again within the 60 calendar days. All that is required is that the hearing must be conducted within the 60-day time limit. 208 CA3d at 572–573.

☛ JUDICIAL TIP: Although there is no case on point, the better practice is to obtain a new waiver from the defendant if the defendant gives only a limited waiver to a specific date and the

hearing is to be continued to a later date even if that date is within the 60-day time limit. Also note that even though a defendant's waiver may not be required after the waiver of the ten-day period, good cause under Pen C §1050(b) must still be shown for any continuance. *People v Alvarez* (1989) 208 CA3d 567, 577, 256 CR 289

The preliminary hearing may be held beyond the 60-day time limit only if the magistrate takes a personal waiver from the defendant of this time limit. Pen C §859b. See Simons, Preliminary Examinations §1.1.11.

☛ JUDICIAL TIP: Many judges at the arraignment and at following appearances routinely request both ten-court-day and 60-calendar-day waivers from defendants. Some defendants waive the shorter period only.

d. [§92.41] Consequences of Untimely Hearing

In-custody defendants—ten-day limit. The magistrate must dismiss the complaint if the preliminary hearing is set or continued beyond ten court days from the date of the arraignment or plea, whichever is later, and the defendant has remained in custody for ten or more days solely on that complaint, unless the defendant has waived the right to a hearing within the ten-day period or good cause exists for the delay. Pen C §859b; *People v Pickens* (1981) 124 CA3d 800, 806, 177 CR 555. The defendant need not show prejudice on a Pen C §995 motion challenging this type of error by the court. 124 CA3d at 806. A defendant who was in custody at the arraignment, but who is released from custody in less than ten court days, is not entitled to a dismissal if the preliminary hearing is not held within the ten-day period. See Simons, Preliminary Examinations §1.1.15.

Custody based "solely on that complaint" has been defined as custody "for reasons solely attributable to the charges to be adjudicated at the preliminary examination." *People v Standish* (2006) 38 C4th 858, 866 n2, 43 CR3d 785. See the judicial tip at §92.3 for handling cases of defendants in custody for the current charge and violation of court probation, formal felony probation, or parole, and the flowchart in the Appendix.

Out-of-custody defendants—ten-day limit. Violation of the ten-court-day rule affecting out-of-custody defendants does not result in dismissal unless the defendant shows that he or she suffered actual prejudice from the delay. *People v Luu* (1989) 209 CA3d 1399, 1404–1407, 258 CR 10. (court should, however, make every effort to provide out-of-custody defendants with hearing within ten-day limit).

All defendants—60-day limit. The magistrate must dismiss the complaint if the preliminary hearing is not held within 60 calendar days from the date of the arraignment or plea, whichever is later, unless the defendant personally waives the right to a preliminary hearing within 60 days. Pen C §859b. This rule applies whether or not the defendant is in custody and whether or not good cause exists for the delay. Pen C §859b. When good cause for the delay exists, but the complaint is dismissed for a violation of the 60-day rule, the dismissal does not count as one of the two dismissals permitted under Pen C §1387. An additional filing of charges is therefore permitted under Pen C §1387.1. See discussion in §92.94.

If the magistrate sets the preliminary hearing beyond the time limits set forth in Pen C §859b or continues the hearing without good cause, the prosecution or the defense may file a petition for a writ of mandate or prohibition in the superior court seeking immediate appellate review of the magistrate's order. Pen C §871.6.

5. [§92.42] Defendant's Presence at Preliminary Hearing

In general, the defendant must be personally present at the preliminary hearing. Pen C §§977(b)(1), 1043.5(a). The defendant's presence is required, in part, so that he or she may be identified in court as the perpetrator. See *People v Green* (1979) 95 CA3d 991, 1003, 157 CR 520.

In a noncapital case, the magistrate may proceed with the preliminary hearing if the defendant becomes voluntarily absent after the hearing has commenced in his or her presence. Pen C §1043.5(b)(2). See §92.43 for handling a hearing when defendant is disruptive and must be removed from the courtroom.

☛ JUDICIAL TIP: When a defendant, present at the outset of the preliminary hearing, later does not appear, and the magistrate proceeds with the hearing on the assumption that the defendant has become voluntarily absent, the defendant may later prevail on a Pen C §995 motion and invalidate the holding order. If the defendant establishes that the nonappearance was due to causes other than voluntary absence and the magistrate had no sufficient factual basis for finding a voluntary absence, the information will be set aside. To avoid this problem, some courts continue the preliminary hearing and issue a bench warrant under Pen C §978.5 to secure the defendant's physical presence before resuming the hearing. See *People v Gutierrez* (2003) 29 C4th 1196, 1206–1209, 130 CR2d 917 (defendant who, in presence of court reporter and bailiff, unequivocally stated to defense counsel that he did not want to attend his trial and would not leave lockup was

voluntarily absent, and judge properly continued with trial in defendant's absence without obtaining express waiver from him).

For further discussion, see Simons, Preliminary Examinations §§2.4.4–2.4.5.

6. [§92.43] Handling the Disruptive Defendant

A disruptive defendant, *i.e.*, a defendant who engages in conduct that is so disorderly, disruptive, and disrespectful of the court that the preliminary hearing cannot be carried on with the defendant present, may be removed from the courtroom. Pen C §1043.5(b)(1). The magistrate must first warn the defendant that continued disruptive behavior may lead to the defendant's removal. Pen C §1043.5(b)(1). A defendant who has been removed may return to the courtroom when willing to conduct himself or herself with decorum and respect. Pen C §1043.5(c). See *People v Sully* (1991) 53 C3d 1195, 1239–1240, 283 CR 144; *King v Superior Court* (2003) 107 CA4th 929, 132 CR2d 585.

☛ JUDICIAL TIP: A pro per defendant who becomes disruptive may not be removed leaving no one to assert the defendant's rights in the continuing proceedings. *People v Carroll* (1983) 140 CA3d 135, 141–144, 189 CR 327. Appropriate alternative means of dealing with a pro per defendant's disruptive behavior include citing the defendant for contempt, restraining the defendant, or appointing counsel for the defendant before removing the defendant from the courtroom. 140 CA3d at 142. Some judges suggest appointing standby counsel in cases of a disruptive pro per defendant. See, *e.g.*, *People v El* (2002) 102 CA4th 1047, 1049–1051, 126 CR2d 88 (error for court to proceed in disruptive defendant's absence when standby counsel is available to appear for defense; however, error is harmless when defendant is left unrepresented only for brief time).

A defendant should not be shackled, handcuffed, or otherwise physically restrained at the preliminary hearing absent a finding of good cause for such drastic action based on a showing of the defendant's violence, threat of violence, or other nonconforming behavior. *People v Fierro* (1991) 1 C4th 173, 219, 3 CR2d 426, disapproved on other grounds in 50 C4th 99, 206–207. See Pen C §688 (no person charged with public offense may be subjected, before conviction, to any more restraint than is necessary for his or her detention to answer the charge); *People v Seaton* (2001) 26 C4th 598, 652, 110 CR2d 441 (fact that defendant is charged with violent crime does not establish sufficient threat of violence or disruption to justify physical restraints, nor does courthouse layout, *e.g.*,

fact that courtroom is near exit, establish individualized suspicion that defendant will engage in nonconforming conduct); *People v Cunningham* (2001) 25 C4th 926, 986, 988, 108 CR2d 291 (defendant's record of violence, or fact that he or she is a capital defendant, does not, by itself, justify shackling; shackling warranted in this case because of evidence defendant might attempt to escape and fact that courtroom assigned for trial did not have a lock); *People v Livaditis* (1992) 2 C4th 759, 774–775, 9 CR2d 72 (victim's unwillingness to testify in defendant's presence unless he was handcuffed justified the restraint, as did defendant's abuse of victim and defendant's history of escape attempts). See also *People v Mar* (2002) 28 C4th 1201, 124 CR2d 161 (factors to be considered in determining propriety of using stun belt). A general policy of shackling defendants is unlawful. *Solomon v Superior Court* (1981) 122 CA3d 532, 536, 177 CR 1.

Because the dangers of unwarranted shackling at the preliminary hearing, however, are not as substantial as those presented during trial, a lesser showing for the need for shackling than that required at trial is appropriate. *Small v Superior Court* (2000) 79 CA4th 1000, 1016, 94 CR2d 550. Moreover, it is an abuse of discretion for the judge to order that the defendant's hands should be completely unrestrained at the preliminary hearing, when a sufficient showing is made that the defendant poses a security risk in the courtroom, *e.g.,* when the defendant has a documented history of violence while in custody, and has shown an ability to craft everyday items into dangerous weapons and to hide them in his body cavities. 79 CA4th at 1015–1018 (justifications for shackling in court are not restricted to defendant's previous attempts to disrupt courtroom proceedings or to escape; appellate court approved judge's order that resulted in defendant's right hand being secured with 10-inch extension chain to waist chain to enable him to take notes).

Evidence of the defendant's behavior which leads the magistrate to conclude that the defendant should be physically restrained must appear on the record. It is an abuse of discretion to impose physical restraints without a showing on the record of violence or a threat of violence or other nonconforming conduct. *People v Seaton*, *supra*, 26 C4th at 651.

The magistrate may not delegate to law enforcement personnel the decision whether to shackle the defendant. 26 C4th at 651.

☛ JUDICIAL TIP: Restraining a defendant is rarely necessary. It should not be done on the court's own initiative. The defendant and defense counsel should first be given full opportunity to be heard. When in doubt, the better practice is not to shackle or restrain.

7. Complying With One-Session Requirement

a. [§92.44] Conducting Hearing in One Session

In general. A magistrate must complete the preliminary hearing in one session unless the defendant personally waives the right to a continuous hearing (see §92.45) or the magistrate postpones it for good cause shown in an affidavit or declaration. Pen C §861(a). The "one-session" requirement of the statute does not mean that the preliminary hearing must be completed in a single day. *Stroud v Superior Court* (2000) 23 C4th 952, 965, 98 CR2d 677. Instead, a "session" is an actual sitting of the court continued by adjournments in ordinary course from day to day, or over Sundays and holidays, but not interrupted by an adjournment to a distant day. 23 C4th at 965. The latter is a "postponement," which is different from a temporary cessation or interruption in the proceedings to allow for the comfort of the participants or to observe a legal holiday. 23 C4th at 965. If, at the outset of the preliminary hearing, it appears that there is a reasonable possibility that outside demands might conflict with the uninterrupted completion of the hearing, it is prudent and preferable for the magistrate to take immediate steps to determine whether the case should be reassigned so that the hearing can be completed in a single session. 23 C4th at 973 n13.

Good cause for postponement. The statute does not define what constitutes "good cause" for a postponement of the preliminary hearing after commencement. 23 C4th at 969. But numerous judicial decisions indicate that good cause for postponement is not shown by counsel's unpreparedness to proceed, or by the unavailability of a judge to preside over the proceeding or the unavailability of a courtroom in which to conduct the proceeding. 23 C4th at 969. Scheduling conflicts arising from exceptional circumstances, *i.e.*, unique and nonrecurring events, may sometimes justify a brief postponement. 23 C4th at 970.

Time limits on postponement. If the magistrate postpones the hearing on a showing of good cause for more than ten days, the defendant must be released from custody under Pen C §859b. Pen C §861(a)(2). The postponement may not extend beyond 60 days from the date the motion is granted unless the defendant consents. Pen C §861(b).

A magistrate may postpone a preliminary hearing for one court day to accommodate the special physical, mental, or emotional needs of a child witness ten years of age or younger or a dependent person. Pen C §861.5. "Dependent person" means any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical

or mental abilities have significantly diminished because of age. "Dependent person" also includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in Health & S C §§1250, 1250.2, and 1250.3. Pen C §288(f)(3). In such event, the magistrate must admonish both parties against coaching the witness before his or her next appearance at the preliminary hearing. Pen C §861.5. See Simons, Preliminary Examinations §6.3.1, for a discussion of postponing the hearing out of concern for other witnesses.

Postponement for court matters. A magistrate may interrupt a preliminary hearing for brief court matters, as long as a substantial majority of the court's time is devoted to the preliminary hearing. Pen C §861(c). A recess for one day for the magistrate to attend a scheduled Judicial Council task force meeting on drug courts did not come within the "brief-court-matters" exception to the one-session rule and was not in itself good cause for the postponement. *Stroud v Superior Court*, *supra*, 23 C4th at 971 (Judicial Council business or other educational, organizational or community obligation not good cause in and of itself, but may be good cause for delay when considered with unanticipated length of hearing, prior commitment and lack of other options).

For further discussion of the one-session rule, see Simons, Preliminary Examinations §§1.2.1–1.2.8. For a script for a one-session waiver, see §92.112.

b. [§92.45] Waiver of One-Session Requirement

The defendant must personally waive the right to a continuous preliminary hearing. A waiver by counsel is ineffective. Pen C §861(a)(1). The defendant's waiver should be put on the record. A defendant's request for a continuance of the preliminary hearing for the purpose of filing a motion to suppress under Pen C §1538.5(f)(2), is considered a personal waiver of the defendant's right to a continuous preliminary hearing. Pen C §861(d).

A magistrate does not need to obtain a waiver from the defendant to attend briefly to other court matters. Interruptions may be appropriate in many situations. See §92.44. Many judges, however, routinely request a one-session waiver from the defendant if there is any uncertainty as to how long a particular interruption may last.

A defendant does not waive the one-session requirement for all purposes by consenting to early adjournments on specified days for the convenience of counsel. *Stroud v Superior Court* (2000) 23 C4th 952, 965, 967, 98 CR2d 677. Moreover, when a defendant waives a continuous preliminary hearing under Pen C §861, agreeing that the hearing is to be resumed at a specific future date, the waiver does not permit the delay to

extend beyond that date. *Kruse v Superior Court* (2008) 162 CA4th 1364, 1372–1373, 76 CR3d 664.

For further discussion, see Simons, Preliminary Examinations §1.2.9. For a script for a one-session waiver, see §92.112.

c. [§92.46] Consequences of Violating One-Session Requirement

The complaint must be dismissed if the preliminary hearing is not completed in one session and the defendant has not waived the right to a continuous preliminary hearing. Pen C §861. An alleged violation of the one-session requirement is usually raised by a Pen C §995 motion. The defendant need not make an affirmative showing of prejudice to have the complaint dismissed, but only show that good cause for violating the requirement was not established. See *People v Bucher* (1959) 175 CA2d 343, 346, 346 P2d 202.

8. [§92.47] Advising Defendant of Charges

Two early decisions interpret Pen C §864 as requiring a reading of the complaint at the beginning of the preliminary hearing to inform the defendant of the charges. *People v Miller* (1918) 177 C 404, 407, 170 P 817; *In re Williams* (1921) 52 CA 566, 568, 199 P 347. Normally, the magistrate asks for and receives from defense counsel a waiver of the reading of the complaint. The waiver should be made part of the record.

☛ JUDICIAL TIP: When the defendant is unrepresented, and in all capital cases, many judges read the complaint even if the defendant offers to waive the reading. See discussion concerning summarizing the complaint in §92.4(7).

9. [§92.48] Reporting Preliminary Hearing

A defendant has a right to a transcript of the preliminary hearing without charge. Pen C §§869(f), 870. A transcript of the preliminary hearing is always required in a homicide case, and must be made in all other cases on the request of the prosecution or the defense. Pen C §869. See Pen C §190.9 (all proceedings in death penalty cases must be reported). As a matter of practice, preliminary hearings are always reported, even in the absence of a request. See Simons, Preliminary Examinations §2.2.7.

If the defendant is held to answer, the reporter must deliver the transcript to the clerk of the superior court within ten days of the close of the hearing. Pen C §869(e). Late filing does not require dismissal of the case. *People v Ladmirault* (1989) 214 CA3d 900, 903, 263 CR 285.

B. [§92.49] Exclusion of Witnesses

At the request of either the prosecutor or the defendant at any time after the commencement of the preliminary hearing, the magistrate must exclude all potential and actual witnesses who have not been examined. Pen C §867. The magistrate must also order the witnesses not to talk to each other until they have all been examined. If feasible, the magistrate may order the witnesses to be kept separate from each other until they are all examined. Pen C §867. Either party may challenge the exclusion of any person by requesting that a hearing be held to determine if that person properly may be excluded. Pen C §867.

The exclusion of witnesses is designed to prevent collusive or false testimony. *Perry v Leeke* (1989) 488 US 272, 281 n4, 109 S Ct 594, 102 L Ed 2d 624; *People v Valdez* (1986) 177 CA3d 680, 687, 223 CR 149. If the person to be excluded is an actual or potential witness, the magistrate has no discretion to deny the motion. *People v Young* (1985) 175 CA3d 537, 541, 221 CR 32; see discussion in §92.51. However, to be subject to exclusion, the person must be an actual or potential witness at the preliminary hearing, not merely at the trial or another proceeding in the case. Pen C §867.

An order excluding witnesses does not apply to investigators for the prosecutor or the defendant or to any officer having custody of witnesses. Pen C §867.

1. [§92.50] Procedure for Implementing Exclusion Order

A motion to exclude witnesses under Pen C §867 must be granted when requested by either side. Frequently, some witnesses subject to the order will be in the courtroom; some will be outside in the adjacent areas while others will arrive during the preliminary hearing. The magistrate, after announcing the order excluding witnesses and forbidding communication, will usually advise the attorneys to contact the witnesses they know, both in and out of the courtroom, and advise them of the order. The bailiff normally places a prominent sign on the outside door of the courtroom notifying witnesses not to enter and not to communicate with each other. The bailiff may also ask each person entering the courtroom if he or she is a witness, and, if so, the bailiff directs the person to wait outside the courtroom. In most situations, this procedure effectively implements a witness exclusion order.

2. [§92.51] Distinguishing Actual and Potential Witnesses

Most judges rely on the attorneys to determine who is an actual or potential witness subject to the exclusion order. The attorneys are in the best position to know the identity of these witnesses.

The usual practice is to issue an order in response to a motion to exclude and to wait for an objection before requesting an offer of proof from the moving party. If the offer of proof establishes that a particular person will be called as a witness in the preliminary hearing, the exclusion order stands. Some judges demand an offer of proof from the moving party and invite objection from the other side before issuing the witness exclusion order. To do this routinely in every case, however, would consume time unnecessarily.

☛ JUDICIAL TIP: A challenge to the exclusion of a potential witness is more difficult to resolve without guidance from statutory or case law. Some judges employ the standard of reasonable possibility that a person may be called to testify at the hearing. Other judges use the standard of reasonable probability.

If either side moves to challenge the witness-exclusion order, the magistrate must hold a hearing on the record to determine if the person sought to be excluded is, in fact, excludable. Pen C §867. For further discussion, see Simons, Preliminary Examinations §3.1.2.

☛ JUDICIAL TIP: Some judges resolve exclusion problems by calling the witnesses subject to dispute first. After being examined and excused, they are as free to attend the hearing as any other member of the public. Pen C §867; see *People v Disandra* (1987) 193 CA3d 1354, 1359, 239 CR 9.

3. [§92.52] Effect of Violating Exclusion Order

A judge may hold a witness in contempt for violating an order excluding witnesses from the courtroom. See CCP §1209(a)(5); *People v Duane* (1942) 21 C2d 71, 80, 130 P2d 123. An attorney who participates in violating the order is also subject to contempt. *People v Valdez* (1986) 177 CA3d 680, 691, 223 CR 149; *People v Young* (1985) 175 CA3d 537, 542, 221 CR 32.

The judge may exclude the witness's testimony, but only if the party seeking to offer the testimony was "at fault" in causing the witness's violation of the exclusion order. See *People v Adams* (1993) 19 CA4th 412, 436, 23 CR2d 512; *People v Valdez, supra*, 177 CA3d at 686–696.

☛ JUDICIAL TIP: Many judges believe that attorneys should ensure that their witnesses comply with an exclusion order. Some judges impose monetary sanctions against an attorney whose witnesses violate the order.

For further discussion, see Simons, Preliminary Examinations §3.1.5.

C. Exclusion of the Public

1. Defendant's Motion To Close Hearing (Pen C §868)

a. [§92.53] Standard for Closing Hearing

Generally, a preliminary hearing must be open to the public. However, under Pen C §868, a defendant may move to close the hearing and exclude the public to protect his or her right to a fair and impartial trial. A magistrate may grant a defendant's motion under Pen C §868 only after making specific findings that

- There is a substantial probability that the defendant's right to a fair trial would be prejudiced by publicity that closing the hearing would prevent (Pen C §868); and
- Reasonable alternatives to closing the hearing would not adequately protect the defendant's right to a fair trial (*Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 13–14, 106 S Ct 2735, 92 L Ed 2d 1).

If the magistrate grants the motion, the magistrate must exclude everyone except the defendant, defense counsel, the prosecutor, the investigating officers for both the defense and the prosecution, a person present to give a prosecution witness moral support under Pen C §868 or Pen C §868.5 (see §§92.57, 92.61), and necessary court personnel such as the clerk, court reporter, and bailiff. Pen C §868. Members of the victim's family may also be permitted to remain. See §92.56. A magistrate's failure to remove all persons but those allowed to be present under Pen C §868 renders the commitment legally defective. *Ortega v Superior Court* (1982) 135 CA3d 244, 251, 185 CR 297. The defendant may challenge this error by a Pen C §995 motion.

On determining a motion for a gag order or a motion for an order sealing documentary or physical evidence made in conjunction with a motion for a closed hearing, see Simons, Preliminary Examinations §§3.2.11–3.2.12.

On determining a request for electronic media coverage of a preliminary hearing, see Cal Rules of Ct 1.150 and the discussion in Simons, Preliminary Examinations §§3.2.9–3.2.10.

b. [§92.54] Alternatives to Closing Hearing

The Supreme Court has recognized the potential tainting of a prospective jury pool arising from press coverage of the preliminary hearing. See *Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 14, 106 S Ct 2735, 92 L Ed 2d 1. Although various alternatives to closing the hearing have been suggested, most can be implemented only near to, or at

the time of, trial, *e.g.*, by (*Tribune Newspapers West, Inc. v Superior Court* (1985) 172 CA3d 443, 446, 218 CR 505)

- Changing venue.
- Postponing the trial if the defendant waives time.
- Performing a thorough voir dire.
- Issuing clear instructions regarding press coverage.
- Sequestering the jury.
- Busing untainted jurors from another part of the county.
- Excluding the public from sensitive parts of the preliminary hearing.

These steps may make feasible the selection of an unbiased jury at trial in spite of the pretrial publicity arising from an open preliminary hearing. They should be considered in determining whether to close the hearing.

☛ JUDICIAL TIP: Closing a preliminary hearing and sealing the transcript should be used with caution and only in extraordinary cases. In cases that attract media attention, this action (see *Cromer v Superior Court* (1980) 109 CA3d 728, 732, 167 CR 671) may be the last resort to preserve a defendant's right to an impartial jury.

c. [§92.55] Requirement That Press Be Notified

Under the first amendment, the press and the public have the fundamental right to be present at criminal proceedings. When a defendant makes a motion to close the preliminary hearing under Pen C §868, the media, including the press, are interested parties to the motion and must be given notice of it. See *Tribune Newspapers West, Inc. v Superior Court* (1985) 172 CA3d 443, 453–454, 218 CR 505.

Although no procedures are specified for notifying the press, the court, under its inherent power and under CCP §187, may adopt its own reasonable measures. *Telegram-Tribune, Inc. v Municipal Court* (1985) 166 CA3d 1072, 1074, 213 CR 7.

A magistrate should check with the presiding judge to determine if any arrangement has been established or followed by the court for contacting the press when motions to close are made.

What constitutes reasonable notice to the press was not established by the court in *Tribune Newspapers West, Inc., supra,* in which two-and-a-half-hours' notice was held to be clearly insufficient. Sufficient advance notice so that the press can contact legal counsel and arrange for

representation at the hearing on the motion should guide the court in determining "reasonable notice."

If confidential matters will be presented to the court on an opposed motion, the magistrate may conduct a bifurcated hearing: the defendant's nonconfidential evidence for closing the hearing and any opposition is offered in public, and an in-camera hearing is then held for the presentation of the defendant's confidential evidence and for the defendant's response to any questions posed by the press or the public. The court should retain a record of the entire proceeding, both public and in-camera, for later review. *Telegram-Tribune, Inc. v Municipal Court, supra*, 166 CA3d at 1074. If the defendant moves to seal documentary or physical evidence in the file, the magistrate should employ the standard for closing the hearing in deciding the motion. *Associated Press v U.S. Dist. Court* (9th Cir 1983) 705 F2d 1143, 1145–1147; see discussion in §92.53. For further discussion, see Simons, Preliminary Examinations §§3.2.1–3.2.7.

In a high profile case, some judges call in the attorneys several days before the date of the preliminary hearing, either as part of the prehearing conference or before that conference. The judge sets forth the procedures for notifying the press and the time limits to be followed if the defendant intends to make a motion to close the hearing.

d. [§92.56] Admitting Alleged Victim's Family

If the preliminary hearing is closed, the prosecutor may make a motion to allow the victim's family into the courtroom. Pen C §868. The magistrate must grant the prosecutor's motion unless the magistrate finds that (Pen C §868):

- Exclusion is necessary to protect the defendant's right to a fair and impartial trial, or
- The presence of the victim's family poses a risk of affecting the content of the victim's testimony or that of any other witness.

The alleged victim's family includes his or her spouse, parents, legal guardian, children, and siblings. The magistrate must admonish the family members in attendance not to discuss any testimony with anyone. Pen C §868.

e. [§92.57] Admitting Moral Support Person for Prosecuting Witness

A prosecuting witness may have a person of his or her choice present for moral support at a closed preliminary hearing during the witness's testimony, as long as this person is not also a witness. Pen C §868. For

purposes of Pen C §868, the term "prosecuting witness" means all the prosecution's witnesses, not just the victim of the crime. *Ortega v Superior Court* (1982) 135 CA3d 244, 252, 185 CR 297. A magistrate may not reject the witness's choice of a support person. 135 CA3d at 253–254. If the support person requires an interpreter, that person may also be admitted to the hearing. 135 CA3d at 254.

For further discussion, see Simons, Preliminary Examinations §§3.2.14–3.2.15.

2. Prosecutor's Motion To Close Hearing for Specific Witnesses

a. [§92.58] Motion To Close Hearing During Examination of Witness Who Is Minor or Dependent Person Victim of Sex Offense; Other At-Risk Witnesses (Pen C §868.7)

On a prosecution motion under Pen C §868.7, the magistrate may close the preliminary hearing during the testimony of the following (Pen C §868.7(a)):

- A minor or a dependent person with a substantial cognitive impairment, who is the complaining victim of a sex offense, if it is determined that testimony before the public would be likely to cause serious psychological harm to the witness and there are no alternative procedures that can be employed short of closing the hearing, such as a videotaped deposition of the witness or a hearing conducted at another location and transmitted via closed circuit television to the court. "Dependent person" means any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. "Dependent person" also includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in Health & S C §§1250, 1250.2, and 1250.3. Pen C §288(f)(3).
- A witness whose life would be subject to substantial risk in appearing before the public if it is determined that there are no alternative security measures that can be taken short of closing the hearing, such as concealing the witness's features or physical description, careful search of members of the public when entering the courtroom, or the temporary exclusion of other actual or potential witnesses.

The case must be dismissed on the defendant's motion under Pen C §995 if the court fails to consider whether alternative measures to closing the hearing exist. *Eversole v Superior Court* (1983) 148 CA3d 188, 200–202, 195 CR 816.

When public access to the preliminary hearing is restricted, a transcript of the testimony must be made available to the public as soon as practicable. Pen C §868.7(b).

The fundamental right of the press and the public to be present at criminal proceedings flows from the first amendment. When that right is restricted, the magistrate must make findings showing both the necessity of the restriction in light of a compelling governmental interest and also a narrow tailoring to serve that interest. See *People v Baldwin* (2006) 142 CA4th 1416, 1421–1423, 48 CR3d 792; *Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 21, 106 S Ct 2735, 92 L Ed 2d 1. The welfare of a minor victim, and probably also the physical protection of a witness, are compelling state interests.

Factors to be weighed in protecting the welfare of a minor victim include the following (*Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 608, 102 S Ct 2613, 73 L Ed 2d 248):

- The minor's age,
- The minor's psychological maturity and understanding,
- The nature of the crime,
- The victim's wishes, and
- The interests of the minor's parents and relatives.

For limits on the use of closed-circuit testimony, see the discussion of Pen C §1347 and *Hochheiser v Superior Court* (1984) 161 CA3d 777, 208 CR 273, in Simons, Preliminary Examinations §§6.2.1–6.2.8.

☛ JUDICIAL TIP: In light of the authorization in Pen C §872(b) to use hearsay testimony in preliminary hearings, an additional alternative to closing the hearing is the use of a qualified law enforcement officer to present the complaining victim's testimony. See §92.64.

For further discussion, see Simons, Preliminary Examinations §§3.4.1–3.4.7.

b. [§92.59] Motion To Close Hearing To Protect Reputation of Minor or Dependent Person Victim of Sex Offense (Pen C §859.1)

On the prosecutor's motion in any criminal proceeding in which the defendant is charged with a sex offense against a minor under 16 years of

age or a dependent person with a substantial cognitive impairment, the magistrate must hold a hearing to determine whether the testimony of, or about, the minor should be closed to the public to protect the minor's or dependent person's reputation. Pen C §859.1(a). "Dependent person" means any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. "Dependent person" also includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in Health & S C §§1250, 1250.2, and 1250.3. Pen C §288(f)(3).

Under Pen C §872(b), it is likely that the testimony relating to a sex offense against a minor or dependent person victim subject to the protection of this statute will be offered by a qualified law enforcement officer rather than the victim. See §92.64. Nevertheless, the protection afforded by Pen C §859.1 continues to be applicable because that protection also extends to the minor's or dependent person's reputation.

In making the determination required by Pen C §859.1, the magistrate must consider all the following (Pen C §859.1(b)):

- The nature and seriousness of the offense;
- The minor's age or the level of cognitive development of the dependent person;
- The extent to which the size of the community would preclude preserving the victim's anonymity;
- The likelihood of public opprobrium because of the victim's status;
- The existence of an overriding public interest in having an open hearing;
- Whether the prosecution has demonstrated a substantial probability that the victim's identity would otherwise be disclosed to the public and that this disclosure would cause serious harm to the victim;
- Whether the victim has disclosed information concerning the case to the public through press conferences, public meetings, or other means; and
- Other facts the magistrate considers necessary to protect the interests of justice.

See also discussion of *Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 102 S Ct 2613, 73 L Ed 2d 248, in §92.58.

The prosecution may also apply for an order that the testimony at the preliminary hearing of a victim 15 years old or younger or who is developmentally disabled as a result of mental retardation, be videotaped. Pen C §1346(a). A written application must be served at least three days before the hearing. Pen C §1346(b). On timely receipt of the application, the magistrate must issue the order. Pen C §1346(c). The videotape must be made available to the prosecution and the defense, and is subject to a protective order to protect the victim's privacy. Pen C §1346(e)–(f). Videotaping the victim's testimony does not preclude a request by the prosecution to close the hearing under Pen C §868.7 (see §92.58). Pen C §1346(e). For further discussion of videotaping a victim's testimony, see Simons, Preliminary Examinations §§6.1.1–6.1.3.

For further discussion of Pen C §859.1 motions, see Simons, Preliminary Examinations §§3.5.1–3.5.4.

3. [§92.60] Removal of Spectator Intimidating Witness

The court may order the removal of any spectator who is intimidating a witness if, after a hearing, the court makes the following findings based on clear and convincing evidence (Pen C §686.2(b)):

- The spectator is actually engaging in intimidation of the witness;
- The witness will be unable to give full, free, and complete testimony if the spectator is not removed; and
- Removal of the spectator is the only reasonable means of ensuring that the witness may give full, free, and complete testimony.

The court has no authority to remove the press or the defendant under this provision. Pen C §686.2(c).

The court also has general authority to preserve order under CCP §177, and thus may exclude individuals who are disrupting the proceedings.

D. [§92.61] Support Persons for Prosecution Witnesses in Cases Involving Violent Felonies

Right to support person(s). A prosecuting witness in a case involving a violent felony listed in Pen C §868.5(a), may have two persons of his or her choice present for moral support during the witness's testimony at the preliminary hearing. Pen C §868.5(a). For purposes of Pen C §868.5, the term "prosecuting witness" means all the prosecution's witnesses, not just the victim of the crime. *People v Kabonic* (1986) 177 CA3d 487, 493, 223 CR 41.

On the defendant's request, the magistrate must hold an evidentiary hearing to determine the necessity for the support persons. *People v Adams*

(1993) 19 CA4th 412, 443–444, 23 CR2d 512 (upholding constitutionality of Pen C §868.5). A defendant who fails to object to a support person's presence during the hearing may not raise the issue on appeal. *People v Lord* (1994) 30 CA4th 1718, 1721–1722, 36 CR2d 453.

More than one support person. Only one of the support persons may accompany the witness to the stand, although the other may be present in the courtroom during the witness's testimony. Pen C §868.5(a).

Witness as support person. One of the support persons may also be a witness. In such an event, the prosecutor must present evidence that the person is desired by and will be helpful to the prosecuting witness. Pen C §868.5(b). The magistrate must then permit this person to be present as a support person unless the defendant establishes, or the magistrate otherwise determines, that the person's presence poses a substantial risk of influencing the prosecuting witness's testimony. The magistrate must admonish the support person not to prompt, sway, or influence the witness, and may remove a support person who violates the admonition. Pen C §868.5(b).

The testimony of a support person who is also a witness must be taken before the testimony of the prosecution witness, who must be excluded during the support person's testimony. Pen C §868.5(c). The magistrate should allow the support person to be recalled for further testimony if the prosecution, in good faith, fails to discover evidence about which the support person has knowledge until after the support person and the witness have testified. *People v Redondo* (1988) 203 CA3d 647, 653, 250 CR 46.

Minor's mother as support person. In a prosecution for sex crimes on a minor, the minor's mother may serve in the capacity of a support person while the minor is testifying. *People v Johns* (1997) 56 CA4th 550, 553–556, 65 CR2d 434.

Support person associated with media. Neither support person may be associated with a news publication (see Evid C §1070(a)) unless the support person is related to the witness as a parent, guardian, or sibling. A support person who is associated with a news publication may not make notes of the proceeding. Pen C §868.5(a).

E. [§92.62] Precautions for Disabled or Minor Victims of Designated Sex Offenses

In any criminal proceeding in which a defendant is charged with a sexual offense committed on a minor under 11 years of age or on a person with a disability (see Govt C §12926(i)—disability defined), the

magistrate must take special precautions to comfort and support such person and to protect him or her from coercion, intimidation, or undue influence as a witness. Pen C §868.8. These special precautions may include (Pen C §868.8)

- Allowing the disabled person or minor relief periods out of the courtroom during testimony.
- Removing the magistrate's judicial robe if he or she believes it may intimidate the disabled person or minor.
- Relocating the magistrate, court personnel, parties, witnesses, and any support persons within the courtroom to facilitate a more comfortable and personal environment for the disabled person or minor.
- Limiting the hours of the disabled person's or minor's testimony to normal school hours.

For further discussion, see Simons, Preliminary Examinations §§6.4.1–6.4.5.

F. Determining Admissibility of Evidence at Preliminary Hearing

1. [§92.63] Exceptions To General Rules of Evidence

In general, only competent evidence that is otherwise admissible under the Evidence Code may be introduced at the preliminary hearing. See *Lozoya v Superior Court* (1987) 189 CA3d 1332, 1338, 235 CR 77. There are, however, a number of exceptions to this general rule:

- Qualified law enforcement officers may testify to hearsay declarations at the hearing. See Pen C §872(b); discussion in §92.64.
- Evidence Code §1203, which provides that a hearsay declarant may be called by the adverse party as if under cross-examination, does not apply if the statement is offered at the preliminary hearing by a qualified law enforcement officer. See Evid C §1203.1; discussion in §92.67.
- Minors who are 13 years of age and under, or persons with disabilities, may be examined or cross-examined by closed-circuit television. See Pen C §§1347(b), 1347.5. But if the victim is an adult in a criminal sexual abuse case, a judge may not permit the victim to testify behind one-way glass that prevents the victim from seeing the defendant while testifying as it violates the right of confrontation. *People v Murphy* (2003) 107 CA4th 1150, 1155–1158, 132 CR2d 688.

- Proof of a content of a writing by otherwise admissible original or secondary evidence is allowed and the evidence rules under Evid C §§1520–1523 are inapplicable. Pen C §872.5.

Only relevant evidence is admissible at the preliminary hearing. Evidence that does not tend to prove or disprove facts showing that an offense has been committed or that the defendant committed it is not admissible. *People v Williams* (1989) 213 CA3d 1186, 1196, 262 CR 303; discussion in §92.66. A party must, however, object at the time seemingly inadmissible evidence is introduced, or any objection is waived. *People v Fisher* (1972) 27 CA3d 928, 932, 104 CR 289.

2. Hearsay Testimony Under Pen C §872(b)

a. [§92.64] Hearsay Testimony by Experienced Law Enforcement Officer

The preliminary hearing testimony is often limited to that of the investigating officer or other law enforcement personnel, who, if qualified, may properly offer hearsay evidence to establish probable cause. *People v DeJesus* (1995) 38 CA4th 1, 15, 44 CR2d 796.

Probable cause may be based, in whole or in part, on the sworn testimony of a law enforcement officer or honorably retired law enforcement officer relating statements of declarants made out of court that are offered for the truth of the matter asserted. Cal Const art I, §30(b); Pen C §872(b); *People v Miranda* (2000) 23 C4th 340, 347–349, 96 CR2d 758; *Whitman v Superior Court* (1991) 54 C3d 1063, 1072–1073, 2 CR2d 160. See also *Peterson v State of California* (2010) 604 F3d 1166, 1168. An honorably retired law enforcement officer may only relate statements of declarants made out of court and offered for the truth of the matter asserted that were made when the honorably retired officer was an active law enforcement officer. Any law enforcement officer or honorably retired law enforcement officer testifying to these statements must either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training (POST) that includes training in the investigation and reporting of cases and testifying at preliminary hearings. Pen C §872(b). Completion of such a course, which qualifies the officer to testify, may be established by the officer's testimony that he or she completed the course and by the magistrate taking judicial notice of the POST's administrative regulations. *People v Dawkins* (1992) 10 CA4th 565, 569–571, 12 CR2d 633; *Hollowell v Superior Court* (1992) 3 CA4th 391, 395, 4 CR2d 321 (officer was not qualified to testify when prosecution failed to establish that training course was approved by POST).

b. [§92.65] "Law Enforcement Officer" Defined

For purposes of Pen C §872(b), the term "law enforcement officer" has been broadly defined to include many types of law enforcement personnel other than police officers, *e.g.*, correctional officers (see *People v Silver* (1995) 35 CA4th 1023, 1027–1028, 41 CR2d 379), arson investigators (see *Martin v Superior Court* (1991) 230 CA3d 1192, 1197–1198, 281 CR 682), and Franchise Tax Board investigators (see *Sims v Superior Court* (1993) 18 CA4th 463, 469–470, 22 CR2d 256). Any investigating agent or officer employed by a state, federal, or local agency, whose primary duty is to enforce the laws administered by that agency, and who otherwise meets the foundational qualifications of Pen C §872(b) concerning experience, may offer hearsay testimony at a preliminary hearing. 18 CA4th at 470.

c. [§92.66] Officer's Personal Knowledge

In addition to meeting the experience requirements, the testifying officer must have personal knowledge of the subject matter about which he or she testifies, *i.e.*, the officer must have sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement. *Whitman v Superior Court* (1991) 54 C3d 1063, 1072–1073, 2 CR2d 160. An officer may not merely recite what another officer has written in a police report, and multiple hearsay is inadmissible. 54 C3d at 1072–1073; *People v Sally* (1993) 12 CA4th 1621, 1626, 16 CR2d 161. See *Shannon v Superior Court* (1992) 5 CA4th 676, 683–685, 7 CR2d 47 (officer could testify to statements made to him by another officer because this testimony involved only a single layer of hearsay, but could not testify to statements victim made to other officer because this was double hearsay); *People v Wimberly* (1992) 5 CA4th 439, 445–447, 6 CR2d 800 (officer could not testify to statements witness made to another officer).

d. [§92.67] Permissible Hearsay

Penal Code §872(b) places no limitations on the "declarant" whose out-of-court statements may be received in evidence through a qualified officer's testimony. *Whitman v Superior Court* (1991) 54 C3d 1063, 1073, 2 CR2d 160 (term "declarants" includes statements or reports of any persons). For example, an officer may testify as to:

- An expert's statements, *e.g.*, in a DUI case, it is acceptable for an officer to testify about the defendant's blood alcohol content based on his or her phone conversation with a criminalist. See *Hosek v Superior Court* (1992) 10 CA4th 605, 608–609, 12 CR2d 650.

- The uncorroborated statements of a declarant who is not a coparticipant even though the defendant is still entitled to impeach that testimony with witnesses at the preliminary hearing or by establishing at trial that the witness is an accomplice. *Ruiz v Superior Court* (1994) 26 CA4th 935, 939–942, 31 CR2d 741.
- The confession of a nontestifying codefendant implicating the defendant in the charged offenses. *People v Miranda* (2000) 23 C4th 340, 349–354, 96 CR2d 758 (magistrates are presumably well-equipped to consider and weigh possible unreliability of accomplice's statement in determining whether to hold defendant for trial).
- A minor victim's out-of-court statements even if the minor is not competent to testify at the preliminary hearing. *People v Daily* (1996) 49 CA4th 543, 551–552, 56 CR2d 787.
- A victim's or witness's statement conveyed through a translator. *Correa v Superior Court* (2002) 27 C4th 444, 452–467, 117 CR2d 27 (translation does not add layer of hearsay when translator acts as language conduit and translated statement is fairly attributable to declarant).

e. [§92.68] Defendant's Rights

All prosecution witnesses who testify, including an officer who testifies under Pen C §872(b), may be cross-examined by the defense. Pen C §865. The defendant also has a right to present exculpatory hearsay evidence through a qualified officer's testimony under Pen C §872(b). *Nienhouse v Superior Court* (1996) 42 CA4th 83, 89–92, 49 CR2d 573. These opportunities for cross-examination and to call witnesses to rebut or qualify the officer's testimony satisfy the demands of due process. *People v Miranda* (2000) 23 C4th 340, 349, 354, 96 CR2d 758.

3. [§92.69] Imposing Relevancy Standards of Pen C §866(b)

The purpose of a preliminary hearing is to establish whether there is sufficient cause to believe that the defendant has committed a felony. Pen C §866(b). See §92.85. This provision, together with the prohibition against using the preliminary hearing for discovery (see §92.70) and the restriction on defense testimony (see §92.71), has restored the narrow purpose of the preliminary hearing as set forth in *People v Elliot* (1960) 54 C2d 498, 504, 6 CR 753 (overruled on other grounds in 27 C3d 519, 528–529). See *Whitman v Superior Court* (1991) 54 C3d 1063, 1080–1081, 2 CR2d 160.

The scope of the hearing and the admissibility of evidence should be restricted to the narrow purpose of the preliminary hearing. Testimony that does not relate to determining probable cause should be precluded. See *People v Williams* (1989) 213 CA3d 1186, 1189 n1, 1197, 262 CR 303.

4. [§92.70] Prohibiting Use of Hearing for Discovery Purposes

The preliminary hearing may not be used for purposes of discovery, nor is the taking of depositions authorized. Pen C §866(b)–(c). The limitation on discovery is one of the major changes affecting the way the hearing is conducted. It abrogates the expansive hearing encouraged by *Jennings v Superior Court* (1967) 66 C2d 867, 59 CR 440, and *McDaniel v Superior Court* (1976) 55 CA3d 803, 126 CR 136.

Either party may informally ask opposing counsel for materials and information, and, if opposing counsel fails to provide the requested discovery within 15 days, the requesting party may seek a court order requiring it. Pen C §1054.5(b). Therefore, discovery may be required from the other party before the preliminary hearing only if the hearing is held more than 15 days after the discovery request. See *People v Superior Court* (Sturm) (1992) 9 CA4th 172, 183, 11 CR2d 652 (upholding constitutionality of Pen C §1054.5); see *People v Jenkins* (2000) 22 C4th 900, 950–951, 95 CR2d 377 (failure to provide discovery before preliminary hearing is not sanctionable absent showing of prejudice). For further discussion, see Simons, Preliminary Examinations §§2.1.7, 2.2.4.

5. [§92.71] Limiting Defense Testimony to Relevant and Helpful Witnesses Under Pen C §866(a)

Ordinarily, the defense role at a preliminary hearing is limited. In most cases, no defense witnesses are called and no affirmative defenses are litigated. Generally, the defense limits itself to cross-examining the prosecution witnesses. *People v DeJesus* (1995) 38 CA4th 1, 15, 44 CR2d 796. See §92.68. However, at the preliminary hearing, the defendant has the right to examine and cross-examine witnesses for the purpose of overcoming the prosecution's case or establishing an affirmative defense. *People v Williams* (1989) 213 CA3d 1186, 1189 n1, 262 CR 303. See *Nienhouse v Superior Court* (1996) 42 CA4th 83, 91, 49 CR2d 573 (right to present exculpatory evidence).

On a prosecution motion under Pen C §866(a), the magistrate must require an offer of proof from the defense as to the testimony expected from a defense witness. See *People v Eid* (1994) 31 CA4th 114, 126–127, 36 CR2d 835 (inadequate offer of proof). The magistrate must not permit the witness to testify unless the offer of proof discloses to the magistrate's

satisfaction that the witness's testimony, if believed, would be reasonably likely to

- Establish an affirmative defense;
- Negate an element of the charged offense; or
- Impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness. Pen C §866(a).

If the magistrate determines that the proposed defense testimony does not meet at least one of these standards, the magistrate should not permit the witness to testify.

6. [§92.72] Limiting Cross-Examination of Prosecution Witnesses

In general, all prosecution witnesses who testify, including an officer testifying under Pen C §872(b) (see §92.64), may be cross-examined. Pen C §865. The cross examination may be conducted in order to

- Negate one of the elements of the charged offense. See *Jennings v Superior Court* (1967) 66 C2d 867, 877, 59 CR 440.
- Raise an affirmative defense. 66 C2d at 877.
- Impeach a witness. *Alford v Superior Court* (1972) 29 CA3d 724, 728, 105 CR 713.

The defendant's right to cross-examine the prosecution's witnesses is, however, subject to the following limitations:

- Cross-examination for purposes of discovery is not permitted. Pen C §866(b); *People v Williams* (1989) 213 CA3d 1186, 1189 n1, 262 CR 303. See §92.70.
- Cross-examination of a prosecution witness concerning probable cause for a search, in the absence of a motion to suppress, is irrelevant and, on objection, should be disallowed. 213 CA3d at 1189–1190, 1197. See *People v Barnes* (1990) 219 CA3d 1468, 1472–1473, 269 CR 44 (motion to suppress is only method of litigating search and seizure issues); discussion in §§92.75–92.79.
- Cross-examination that extends into matters not related to the crime and that affect only the weight of the direct testimony may be excluded under Evid C §352. The magistrate may also exclude extrinsic evidence about events or transactions for which the defendant is not being prosecuted, even if the testimony might be relevant to a prosecution witness's credibility. Examples are a prior misidentification by the witness who testifies to identification on direct examination or evidence of a crime committed by the

witness to prove lack of truthfulness and credibility. *Farrell L. v Superior Court* (1988) 203 CA3d 521, 528, 250 CR 25; *People v Stone* (1983) 139 CA3d 216, 221, 188 CR 493. These limitations reflect the rule that a party may not cross-examine a witness on collateral matters for the purpose of eliciting something to be contradicted. *People v Lavergne* (1971) 4 C3d 735, 744, 94 CR 405.

When a prosecution witness is unavailable to testify at trial within the meaning of Evid C §240, the witness's testimony at the preliminary hearing may be admitted, provided the defendant was afforded the opportunity to conduct a thorough cross-examination of the witness. A defendant who knows at the time of the preliminary hearing that it is likely that a particular prosecution witness will be unavailable to testify at trial, and who fails to take full advantage of the opportunity to cross-examine this witness at the preliminary hearing, cannot later complain when the prosecution seeks to admit the witness's preliminary hearing testimony after making a sufficient showing of the witness's unavailability. See *People v Smith* (2003) 30 C4th 581, 134 CR2d 1.

For further discussion, see Simons, Preliminary Examinations §2.2.2. On allowing a represented defendant to cross-examine witnesses himself or herself, see Simons, Preliminary Examinations §2.2.5.

7. [§92.73] Prohibiting Defendant's Cross-Examination of Hearsay Declarant Under Evid C §1203.1

Generally, the declarant of a statement that is admitted as hearsay evidence may be called and examined about the statement by any adverse party as if under cross-examination. Evid C §1203. This provision does not apply, however, if the hearsay statement is offered at a preliminary hearing by a qualified law enforcement officer relating to an out-of-court statement under Pen C §872(b) (see §92.64). Evid C §1203.1.

Evidence Code §1203.1 is not, however, an absolute impediment to the calling of the prosecution's hearsay declarants at the preliminary hearing. *People v Erwin* (1993) 20 CA4th 1542, 1549–1551, 25 CR2d 348. A defendant's right under Pen C §866 to produce and examine defense witnesses at the preliminary hearing is not limited to witnesses the defendant wishes to call other than the hearsay declarants whose statements were introduced by the prosecution. No intent to impose such a limitation can be read into Evid C §§1203 and 1203.1. 20 CA4th at 1550. A defendant is entitled to call a hearsay declarant if the defendant makes a sufficient offer of proof under Pen C §866(a) (see §92.71) to establish a reasonable possibility that the declarant's testimony would substantially

impeach in several material respects the victim's accounts to the testifying officer. 20 CA4th at 1551.

8. [§92.74] Advising Unrepresented Defendant of Privilege Against Compelled Self-Incrimination

A defendant who is represented by counsel may be a witness at the preliminary hearing. The court has no duty to advise such a defendant of the right against self-incrimination. When the defendant takes the stand, he or she effectively waives that right. *People v Thomas* (1974) 43 CA3d 862, 867, 118 CR 226.

A judge is also not required to advise a self-represented defendant of the privilege against compelled self-incrimination, but has the option of doing so. Any advisement must be neutral, *i.e.*, it must not favor one course of action over the other. *People v Barnum* (2003) 29 C4th 1210, 1226, 131 CR2d 499. A defendant who chooses self-representation forgoes counsel's assistance together with the protection that counsel might have provided, which extends to advisement of the privilege against compelled self-incrimination. 29 C4th at 1221–1224 (general principle that self-represented defendant is not entitled to special privileges not given to attorneys applies to privilege against compelled self-incrimination). A self-represented defendant assumes the risk of his or her own ignorance, and cannot compel the court to make up for counsel's absence. Such a defendant cannot reasonably expect the judge to provide an advisement of any right, including the privilege against compelled self-incrimination. 29 C4th at 1226.

G. Motion To Suppress Under Pen C §1538.5

1. Procedural and Practical Considerations

a. [§92.75] Noticed Motion Required

In felony cases, defense counsel may move for the suppression of any evidence, tangible or intangible, that is the product of an illegal search and seizure at the preliminary hearing if the prosecution seeks to introduce the evidence at that hearing. Pen C §1538.5(f)(1); see *People v McDonald* (2006) 137 CA4th 521, 528–529, 40 CR3d 422. California search and seizure procedure is codified in Pen C §1538.5. A defendant can enlarge the scope of examination at the preliminary hearing beyond a determination of whether a public offense has been committed and whether there is probable cause to believe the defendant is guilty of the offense, by filing a suppression motion under Pen C §1538.5. *People v Williams* (1989) 213 CA3d 1186, 1197, 262 CR 303.

All suppression motions under Pen C §1538.5 must be made in writing and be accompanied by a proof of service and by a memorandum of points and authorities that lists the specific items of property or evidence sought to be returned or suppressed and that sets forth the factual basis and the legal authorities that demonstrate why the motion should be granted. Pen C §1538.5(a)(2). The required degree of specificity depends on the legal issue the defendant is raising and on the surrounding circumstances. The defendant need only be specific enough to give the court and the prosecution reasonable notice. *People v Smith* (2002) 95 CA4th 283, 296, 115 CR2d 483. And the defendant need not guess what justifications the prosecution will offer for a contested warrantless search or seizure. Instead, the defendant may wait for the prosecution to present a justification and then respond with specific objections. *People v Williams* (1999) 20 C4th 119, 130, 83 CR2d 275; *People v Smith*, *supra*, 95 CA4th at 295–300.

The moving papers must be filed with the court and personally served on the prosecution at least five court days before the hearing. If the defense was not aware of the evidence or the grounds for suppression before the preliminary hearing, the magistrate may grant a continuance of the hearing for at least five court days for the purpose of filing and serving the motion. Pen C §1538.5(f)(2). Any written response by the prosecution must be filed with the court and personally served on the defense at least two court days before the hearing. Pen C §1538.5(f)(3).

By permitting the prosecution to respond orally to the defendant's motion to suppress, a magistrate does not deprive the defendant of his or her rights to a fair trial and to due process. *People v Britton* (2001) 91 CA4th 1112, 1115, 111 CR2d 199. If the motion is denied at the preliminary hearing, the defendant may file a new and improved memorandum of points and authorities in support of a renewed motion (see §92.80), to address any shortcomings in the defendant's legal arguments occasioned by permitting the prosecution to respond orally to the original motion. This provides the defendant with the opportunity to fully present his or her claims. 91 CA 4th at 1115–1116.

For further discussion, see California Judges Benchbook: *Search and Seizure*, §§6.42–6.47.

b. [§92.76] Grounds for Motion

A search and seizure motion under Pen C §1538.5 may be used to litigate suppression of illegally seized evidence. It may not be used to challenge an allegedly illegal confession or identification unless the confession or identification was the result of an illegal search or seizure. See *People v Mattson* (1990) 50 C3d 826, 850–852, 268 CR 802.

The motion may be made on either of the following grounds:

- The search or seizure *without* a warrant was unreasonable. Pen C §1538.5(a)(1)(A).
- The search or seizure *with* a warrant was unreasonable because:
  - — the warrant was insufficient on its face;
  - — the property or evidence obtained was not described in the warrant;
  - — there was no probable cause for issuance of the warrant;
  - — the method of executing the warrant violated federal or state constitutional standards; or
  - — there was another violation of federal or state constitutional standards. Pen C §1538.5(a)(1)(B).

Warrantless search. When the basis of the suppression motion is a *warrantless* search or seizure, the defendant satisfies his or her initial pleading burden by alleging a warrantless search together with facts and authorities showing the search was made without a warrant, and that the search was unreasonable because it does not come within any exception to the warrant requirement. *People v Williams* (1999) 20 C4th 119, 130, 136, 83 CR2d 275; *People v Smith* (2002) 95 CA4th 283, 288, 115 CR2d 483. The prosecution may respond by alleging that the search was, in fact, made under a warrant, or that a warrantless search was justified on one or more grounds. *People v Williams, supra,* 20 C4th at 130, 135; *People v Smith, supra,* 95 CA4th at 289. The defendant may then file a reply challenging the prosecution's justification. *People v Williams, supra,* 20 C4th at 130, 136; *People v Smith, supra,* 95 CA4th at 290. The defendant's failure to file a reply, however, does not eliminate or diminish the prosecution's burden of proof to establish its justification. 95 CA4th at 290. For a comprehensive discussion of the major exceptions to the warrant requirement, see California Judges Benchbook: *Search and Seizure*, §§5.48–5.160. Warrantless searches incident to temporary detention and arrest are discussed in §§3.95–3.107 and §§4.103–4.136, respectively.

Search with warrant. When a search or seizure is conducted under authority of a warrant, it is presumed to have been lawfully issued and executed, and the burden is on the defendant to establish either that the warrant is invalid or that it was unlawfully executed. Evid C §664; *People v Amador* (2000) 24 C4th 387, 393, 100 CR2d 617. A defendant may challenge the sufficiency of a supporting affidavit on its face, for example, claiming that the warrant lacks probable cause or resulted in the seizure of evidence not described in the warrant. Additionally, a defendant may challenge the truthfulness of the supporting affidavit by making a motion

to traverse a search warrant, that is, claiming that the affidavit contained fatal mistakes or omissions. For discussion of attacking a warrant for misstatements of omissions, see California Judges Benchbook: *Search and Seizure*, §§6.113–6.116 and California Judges Benchguide 58: *Motions To Suppress and Related Motions: Checklists* §§58.17–58.21 (Cal CJER).

For a comprehensive discussion of search warrants and the execution of search warrants, see California Judges Benchbook: *Search and Seizure*, chap 2.

c. [§92.77] Reasonable Expectation of Privacy (Standing)

The defendant has the burden of proving a reasonable expectation of privacy in the place searched or the items seized. *Minnesota v Carter* (1998) 525 US 83, 88, 119 S Ct 469, 142 L Ed 2d 373; *Rawlings v Kentucky* (1980) 448 US 98, 104, 100 S Ct 2556, 65 L Ed 2d 633; *People v Ayala* (2000) 23 C4th 225, 255, 96 CR2d 682.

This burden exists whether or not there was a search warrant. See, *e.g.*, *Minnesota v Carter*, *supra* (no warrant at time of challenged observations); *People v Williams* (1992) 3 CA4th 1535, 1537, 5 CR2d 372 (search warrant). For further discussion of standing, see California Judges Benchbook: *Search and Seizure*, §§6.28–6.41.

d. [§92.78] Evidentiary Rules at Hearing

The judge or magistrate must receive evidence on any issue of fact necessary to determine the suppression motion. Pen C §1538.5(c)(1).

The rules of evidence at the hearing on a suppression motion are the rules set forth in the Evidence Code. *Hewitt v Superior Court* (1970) 5 CA3d 923, 927, 85 CR 493.

Excluding witnesses. While a witness is under examination during the hearing on a suppression motion, the judge or magistrate, on the motion of either party, must exclude all potential and actual witnesses who have not been examined, order the witnesses not to converse with each other until they are all examined, order (if feasible) that the witnesses be kept separate from each other until they are all examined, and hold a hearing on the record to determine if the person sought to be excluded is a person who may be excluded under this provision. Pen C §1538.5(c)(2). This provision for exclusion of witnesses does not apply to the investigating officer, the defendant's investigator, or officers having custody of persons brought before the court. Pen C §1538.5(c)(4). Either party may challenge the exclusion of any person under this provision. Pen C §1538.5(c)(3). On motions to exclude witnesses under Pen C §867, see §§92.49–92.51.

Defendant's testimony. If the defendant testifies in support of the motion, this testimony is not admissible against the defendant at trial,

unless the defendant does not object. This general rule, however, does not apply to incriminating testimony about crimes other than those charged. *King v Superior Court* (2003) 107 CA4th 929, 132 CR2d 585 (defendant cannot immunize other criminal conduct by testifying about it).

e. [§92.79] Limiting Motion to Evidence That Prosecution Seeks To Introduce At The Hearing

The defendant may move to suppress only evidence that the prosecution has sought to introduce at the preliminary hearing. Otherwise, the magistrate must disallow the motion. Pen C §1538.5(f)(1).

2. Defense Options When Motion Is Denied

a. [§92.80] Renewed Motion (Pen C §1538.5(i))

The defendant is generally limited to making one motion to suppress on specific evidence sought to be introduced by the prosecution. Pen C §1538.5(i).

At the preliminary hearing, the defendant may make a motion to suppress with regard to evidence sought to be introduced at the hearing by the prosecution. See Pen C §1538.5(f). If the defendant makes the motion at the preliminary hearing, he or she may renew the motion at a special hearing after the defendant has been held to answer by the magistrate. Pen C §1538.5(i).

Evidence offered at the special hearing on the renewed motion is limited to the transcript of the preliminary hearing and evidence that could not reasonably have been presented at that hearing. Pen C §1538.5(i); *People v Drews* (1989) 208 CA3d 1317, 1324, 256 CR 846. See Simons, Preliminary Examinations §5.3.7. The prosecution is limited to the same evidence, but may recall witnesses who testified at the preliminary hearing. Pen C §1538.5(i). See *People v Hansel* (1992) 1 C4th 1211, 1220, 4 CR2d 888 (prosecution may recall witnesses even if defendant presents no new evidence). The defendant is not entitled to advance theories at the second hearing that were not raised and litigated during the first hearing. *People v Bennett* (1998) 68 CA4th 396, 406–407, 80 CR2d 323.

If the prosecution objects to the defendant's presentation of evidence at the special hearing on the grounds that the evidence could have reasonably been offered at the preliminary hearing, the court must conduct an in-camera hearing on that issue. Pen C §1538.5(i); *People v Drews*, *supra*, 208 CA3d at 1324. The court must base its ruling on all the evidence presented at the special hearing and on the transcript and findings of the magistrate at the preliminary hearing. The court is bound by the factual findings made by the magistrate at the preliminary hearing on evidence or property that is not affected by new evidence presented at the

hearing. Pen C §1538.5(i). See, *e.g.*, *Anderson v Superior Court* (1988) 206 CA3d 533, 544, 253 CR 651 (magistrate's ruling that police officer who testified was more credible than defendant settled question of consent to search).

For more discussion of Pen C §1538.5(i) hearings, see California Judges Benchbook: *Search and Seizure*, §§6.60–6.69.

b. [§92.81] Penal Code §995 Motion

The defendant may also seek review of the magistrate's ruling on the suppression motion by filing a Pen C §995 motion. *People v Laiwa* (1983) 34 C3d 711, 716–721, 195 CR 503. The motion is determined solely on the transcript of the preliminary hearing; no new evidence may be heard or considered. *People v Sahagun* (1979) 89 CA3d 1, 20, 152 CR 233.

3. Prosecution Options When Motion Is Granted and Case Dismissed

a. [§92.82] File New Complaint or Seek Indictment

If the magistrate dismisses the case at the preliminary hearing under Pen C §871 because insufficient evidence remains after the suppression of illegally obtained evidence to support the holding order, the prosecution may file a new complaint or seek an indictment. Pen C §1538.5(j). The ruling on the suppression motion is not binding in any subsequent proceeding, except as limited by Pen C §1538.5(p). Pen C §1538.5(j); *Schlick v Superior Court* (1992) 4 C4th 310, 315, 14 CR2d 406.

Penal Code §1538.5(p) provides that the prosecution may not file another complaint or seek another indictment if the defendant's suppression motion has been granted twice, unless the prosecution discovers new evidence relating to the motion that was not reasonably discoverable at the time of the second hearing. If the prosecution discovers new evidence, the motion must be reheard by the same judge who granted the motion at the first hearing if that judge is available. Pen C §1538.5(p); *Soil v Superior Court* (1997) 55 CA4th 872, 877–881, 64 CR2d 319. By filing an affidavit of prejudice under CCP §170.6, the prosecution does not render this judge unavailable for purposes of rehearing the defendant's suppression motion. To allow the prosecution to peremptorily challenge the judge who decided the first suppression motion would sanction the forum shopping Pen C §1538.5(p) was enacted to prevent. *People v Superior Court* (Jimenez) (2002) 28 C4th 798, 801, 805–809, 123 CR2d 31; *Barnes v Superior Court* (2002) 96 CA4th 631, 638–642, 117 CR2d 621.

b. [§92.83] Motion To Reinstate Complaint

Alternatively, the prosecution may move under Pen C §871.5 to reinstate the complaint, or the parts of the complaint for which the defendant was not held to answer. Pen C §1538.5(j). Any such motion must be noticed within 15 days of the date the charges were dismissed. *People v Dethloff* (1992) 9 CA4th 620, 624, 11 CR2d 814. If the prosecution motion is denied, the prosecutor may not refile the dismissed action. Pen C §871.5(c). If it is granted, the magistrate will be directed to reinstate the complaint and to issue a holding order. A motion to reinstate is proper even if the motion to suppress evidence has been granted twice. *People v Toney* (2004) 32 C4th 228, 233–234, 82 P3d 778.

4. [§92.84] Prosecution Option When Motion Is Granted and Defendant Held To Answer; Special Hearing

If the defendant is held to answer at the preliminary hearing, the magistrate's ruling granting the motion to suppress is binding on the prosecution, unless the prosecution requests a special hearing to relitigate de novo the validity of the search or seizure. Pen C §1538.5(j); *People v Jackson* (2002) 96 CA4th 1265, 1274–1275, 117 CR2d 886 (prosecution cannot escape binding effect of ruling by dismissing case after time for making request for special hearing and refiling case). Any such request must be made within 15 days of the preliminary hearing, on notice to the defendant and the magistrate, and on filing an information. Pen C §1538.5(j). The defendant is entitled to a continuance of the hearing for up to 30 days. Pen C §1538.5(j). The prosecutor is not entitled to a special hearing if the defendant's motion to suppress has been granted twice. Pen C §1538.5(j). The fact that the prosecution can obtain a de novo hearing of a suppression motion under Pen C §1538.5(j), a right that defendants do not have under Pen C §1538.5(i), does not violate due process or give the prosecution an unfair advantage. *People v Weaver* (1996) 44 CA4th 154, 158–160, 51 CR2d 602.

For more discussion of the de novo hearing, see California Judges Benchbook: *Search and Seizure*, §§6.86–6.89.

H. Determining Whether To Issue Holding Order

1. [§92.85] Sufficient Cause

The magistrate must issue an order holding the defendant to answer to the charges if the evidence presented by the prosecution establishes sufficient cause to believe the offense was committed and that the defendant committed the offense. Pen C §§866(b), 872(a); *People v Superior Court* (Shamis) (1997) 58 CA4th 833, 842, 68 CR2d 388. The

term "sufficient cause" is generally equated with reasonable or probable cause. See *People v San Nicolas* (2004) 34 C4th 614, 654, 101 P3d 509; *People v Encerti* (1982) 130 CA3d 791, 800, 182 CR 139.

Sufficient cause is evidence of facts that would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion that a crime has been committed and that the defendant is guilty of the crime. *People v San Nicolas, supra*, 34 C4th at 654; *Hatch v Superior Court* (2000) 80 CA4th 170, 184–185, 94 CR2d 453. If this test is met, the magistrate must issue a holding order. *People v DeJesus* (1995) 38 CA4th 1, 15, 44 CR2d 796. Evidence that will support a prosecution need not be sufficient to support a conviction. *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1026–1027, 13 CR2d 551; *Hatch v Superior Court, supra,* 80 CA4th at 185. There must merely be some rational ground to assume the possibility that an offense has been committed and that the defendant is guilty of it. 80 CA4th at 185. The evidence need not be unambiguous. It is sufficient that a reasonable possibility of guilt is raised. *People v Superior Court* (Kneip) (1990) 219 CA3d 235, 238–239, 268 CR 1.

In weighing the evidence to support sufficient cause, the magistrate determines the credibility of the witnesses testifying at the preliminary hearing. The magistrate is not required to give credence to a witness's testimony when there are grounds for disbelief. *People v Uhlemann* (1973) 9 C3d 662, 668, 108 CR 657.

At the preliminary hearing, the magistrate, without first making a separate probable cause determination, may order the defendant to provide a fingerprint exemplar in order to identify the defendant as the person who committed the offense. See *Virgle v Superior Court* (2002) 100 CA4th 572, 573-575, 122 CR2d 542 (print found at crime scene matched print on known print card for man with same name as defendant; exemplar from defendant was necessary to determine whether defendant and person named on card were same person).

2. Applying Sufficient Cause Standard

a. [§92.86] Elements of Offense

Sufficient cause must be found for every element of the statutory offense charged and may be based on reasonable inferences drawn by the magistrate from circumstantial evidence. *Williams v Superior Court* (1969) 71 C2d 1144, 1148, 80 CR 747; *People v Casillas* (2001) 92 CA4th 171, 178, 111 CR2d 651. "Sufficient cause" is generally equivalent to the reasonable or probable cause required to justify an arrest; it need not be sufficient to support a conviction. 92 CA4th at 178. The defendant may be held to answer if there is some rational basis for assuming the

possibility that he or she committed an offense. *Thompson v Superior Court* (2001) 91 CA4th 144, 149 n4, 110 CR2d 89. But although the evidentiary showing required of the prosecution at the preliminary hearing is minimal, the failure to present any evidence on an element of the charged offense requires dismissal of the allegation. 91 CA4th at 149 n4.

Degree. The magistrate does not make probable cause determinations regarding the degree of the offense. *People v Buckley* (1986) 185 CA3d 512, 522, 228 CR 329. Note that Pen C §664(a), which increases the punishment for attempted murder if the crime is deliberate and premeditated, does not divide attempted murder into degrees. Rather, it establishes a penalty provision to increase punishment. *People v Bright* (1996) 12 C4th 652, 669, 49 CR2d 732, disapproval recognized by *People v Seel* (2004) 34 C4th 535, 550, 21 CR3d 179 (holding that, post-Apprendi, see *Apprendi v New Jersey* (2000) 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435, the premeditation penalty provision which increased punishment beyond the statutory maximum was equivalent to an element of a greater crime; thus, double jeopardy bars retrial of the premeditation allegation); *Huynh v Superior Court* (1996) 45 CA4th 891, 894–896, 54 CR2d 336. Thus, the prosecution must present evidence to support the allegations that the crime was deliberate and premeditated. *Huynh v Superior Court*, *supra*.

☛ JUDICIAL TIP: If there is any uncertainty about the elements constituting a crime, judges generally review the statutory definition of the offense. If further guidance is needed, some consult the appropriate CALCRIM or CALJIC instruction. Many judges also list each element of the offense that must be proved. In taking notes during the preliminary hearing, they check each element listed when evidence to support the element is presented.

b. [§92.87] Prior Conviction

Prior conviction as an element of offense. The prosecution must prove any prior conviction that is an element of the charged offense. See, *e.g.*, *People v Baird* (1995) 12 C4th 126, 129, 48 CR2d 906 (defendant's ex-felon status in prosecution for violation of Pen C §12021 (possession of a firearm by a convicted felon) "is an element of the offense"). When a prior conviction is an element of the offense and no evidence of that conviction is presented at the preliminary hearing, there is no ground for charging the offense in the information. *Salazar v Superior Court* (2000) 83 CA4th 840, 842, 846, 100 CR2d 120.

Prior conviction that serves to elevate a charged offense from a misdemeanor. The prosecution must prove any prior conviction that serves to elevate a charged offense from a misdemeanor. See, *e.g.*, *People v*

Casillas, supra, 92 CA4th at 174 (defendant cannot be held to answer for felony DUI under Veh C §23152, absent proof at preliminary hearing of three separate prior DUI violations resulting in convictions).

The prior conviction requirement of Pen C §666 (petty theft with a prior) is not an element of the statutory offense that must be determined by the jury as the trier of fact. Instead, it is a sentencing enhancement. *People v Bouzas* (1991) 53 C3d 467, 478, 279 CR 847. Nevertheless, when a prior conviction is essential to making an offense a felony, it must be proved. *Thompson v Superior Court, supra,* 91 CA4th at 159. Most judges believe that the *Bouzas* case does not affect the principle rule of *Thompson*. Thus, if a defendant charged with a violation of Pen C §666 refuses to admit the prior, the magistrate probably cannot find sufficient cause for a Pen C §666 violation unless the prosecution proves the prior at the preliminary hearing. See *People v Nguyen* (1997) 54 CA4th 705, 714, 63 CR2d 173.

c. [§92.88] Enhancements

The magistrate must also determine whether the prosecution has presented sufficient evidence at the preliminary hearing to establish probable cause on enhancement allegations that are directly or transactionally related to the charged offense. *Thompson v Superior Court* (2001) 91 CA4th 144, 149, 110 CR2d 89. See *People v Superior Court* (Mendella) (1983) 33 C3d 754, 757, 763, 191 CR 1 (prosecution must present sufficient evidence at preliminary hearing to support great bodily injury enhancement); *Salazar v Superior Court* (2000) 83 CA4th 840, 845–846, 100 CR2d 120 (proof of criminal street gang enhancement is required at preliminary hearing).

The prosecution is not required to present evidence supporting an enhancement based on prior felony convictions unrelated to the crime charged. These enhancements include the habitual criminal statute (Pen C §667(a)) and the three strikes law (Pen C §667(b)–(i)). *People v Shaw* (1986) 182 CA3d 682, 684–686, 227 CR 378; *Thompson v Superior Court* (2001) 91 CA4th 144, 147, 110 CR2d 89. Requiring proof of these allegations at preliminary hearings is inconsistent with Pen C §969a, which allows the prosecution to amend a pending indictment or information to allege prior felonies whenever this omission is discovered. 91 CA4th at 156–157. The magistrate may strike or dismiss enhancements lacking sufficient cause. *People v Superior Court* (Mendella), *supra,* 33 C3d at 762 n8.

d. [§92.89] Special Circumstances

The magistrate should also determine the sufficiency of evidence relating to special circumstances. See *Ghent v Superior Court* (1979) 90

CA3d 944, 955–958, 153 CR 720. If the magistrate does not find sufficient cause to support the special circumstance alleged, he or she may dismiss or strike it under Pen C §871. *Ramos v Superior Court* (1982) 32 C3d 26, 34, 184 CR 622.

For further discussion, see Simons, Preliminary Examinations §§4.1.4, 4.1.6.

e. [§92.90] Misdemeanors Charged With Felony

The purpose of the preliminary hearing is to determine whether sufficient cause exists to believe the defendant has committed a felony. Pen C §866(b). Before being amended by Proposition 115, the statute referred to an offense. Most judges think the change to felony does not affect preexisting law that required sufficient cause to be determined also for misdemeanors that are transactionally related to felonies if they are alleged in the complaint. If a transactionally related misdemeanor is charged together with a felony, the magistrate must find sufficient cause on the misdemeanor or the holding order cannot be issued on the misdemeanor. *People v Thiecke* (1985) 167 CA3d 1015, 1017, 213 CR 731. See also *Griffith v Superior Court* (2011) 196 CA4th 943, 947–948, 126 CR3d 848.

Some judges, however, strictly construe the changes made by Proposition 115 and will not hear evidence about whether there is sufficient cause for misdemeanors regardless of whether they are transactionally related to a felony.

For further discussion, see Simons, Preliminary Examinations §§4.1.7–4.1.8.

3. [§92.91] Discharging Defendant for Insufficient Cause Under Pen C §871

If, after the presentation of evidence, the magistrate determines that no public offense has been committed or that there is insufficient cause to believe the defendant guilty of the charged offense, the magistrate must order the complaint dismissed and the defendant discharged. Pen C §871. See *People v Mower* (2002) 28 C4th 457, 473, 122 CR2d 326 (absent reasonable or probable cause to believe defendant is guilty of possession or cultivation of marijuana, because of defendant's status as a qualified patient or primary caregiver, magistrate should end prosecution).The magistrate must also sign an indorsement on the complaint to the following effect: "There being no sufficient cause to believe the within named A. B. guilty of the offense within mentioned, I order that the complaint be dismissed and that he or she shall be discharged." Pen C §871.

4. Effect of Discharge for Insufficient Cause

a. [§92.92] In General

If the magistrate dismisses the complaint for insufficient cause, the dismissal counts toward the general rule of Pen C §1387 barring further prosecution after two dismissals have occurred. Usually, the prosecutor may refile the complaint once after a first dismissal.

b. [§92.93] Two-Dismissal Rule

The two-dismissal rule of Pen C §1387 generally bars further prosecution of a felony or a misdemeanor charged together with a felony if the same offense is dismissed twice for one of the following reasons:

- Lack of prosecution under Pen C §1381.
- In furtherance of justice under Pen C §1385.
- Violation of the 60-calendar-day rule for conducting the preliminary hearing under Pen C §859b. See §92.39.
- Violation of the one-session rule under Pen C §861. See §§92.44–92.46.
- Insufficient cause for holding the defendant to answer under Pen C §871. See §92.85.
- Information or indictment set aside under Pen C §995.

c. [§92.94] General Exceptions to Two-Dismissal Rule

Renewed prosecution is permitted after a second dismissal if the court finds one of the following two general exceptions to the two-dismissal rule (Pen C §1387(a)):

- Substantial new evidence has been discovered by the prosecution that could not have been known through the exercise of due diligence at, or before, dismissal.
- Termination of the prosecution was the result of the direct intimidation of a material witness as shown by a preponderance of the evidence.

Moreover, the dismissal of the information on the nonstatutory ground that it was a duplicate of another filing does not come within the two-dismissal rule of Pen C §1387. *Berardi v Superior Court* (2008) 160 CA4th 210, 225, 72 CR3d 664.

Additional exceptions to the two-dismissal rule apply when the previous action was terminated under Pen C §859b, §861, §871, or §995 and one of the following conditions occurs (Pen C §1387(c)):

- The prosecution shows good cause why the preliminary hearing was not held within 60 days leading to dismissal under Pen C §859b. See §§92.36–92.38.
- The motion under Pen C §995 was granted because of (1) the present insanity of the defendant; (2) lack of counsel after the defendant chose to represent himself or herself rather than being represented by appointed counsel; (3) ineffective assistance of counsel; (4) defense counsel's conflict of interest; (5) violation of time limits based on the unavailability of defense counsel; or (6) the defendant's motion to withdraw his or her waiver of the preliminary hearing.
- The motion under Pen C §995 was granted after dismissal by the magistrate of the action under Pen C §871 and the defendant was recharged under Pen C §739.

For discussion of the exceptions to the two-dismissal rule as to actions dismissed under Pen C §995, see Simons, Preliminary Examinations §4.4.7. See also Simons, Preliminary Examinations §4.4.13 for discussion of when the filing of a felony or a misdemeanor is permitted, after an earlier dismissal.

d. [§92.95] Violent Felony Exception to Two-Dismissal Rule

Penal Code §1387.1 provides a statutory exception to the two-dismissal rule for defendants charged with violent felonies as defined in Pen C §667.5.

If either of the first two dismissals were for excusable neglect, the prosecution may be permitted one additional opportunity to refile the charges. But no additional refiling is allowed if the conduct of the prosecution amounted to bad faith. Pen C §1387.1(a).

Excusable neglect includes, but is not limited to, error on the part of the court, prosecution, law enforcement, or witnesses. Pen C §1387.1(b); see *People v Massey* (2000) 79 CA4th 204, 210–211, 93 CR2d 890 (defining excusable neglect as neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances, *e.g.*, prosecution's failure to have witnesses in court on date set for trial after making reasonable efforts to secure their attendance); *People v Mason* (2006) 140 CA4th 1190, 1196–1197, 45 CR3d 256 (excusable neglect shown when victim witness was unavailable without knowledge of prosecutor and after numerous postponements where victim had been available, which gave prosecutor reason to believe victim would be available).

For the violent felony exception to apply, the violent felony offense for which charges may be refiled must be one of the charged offenses previously dismissed. Otherwise, the prosecution could avoid the statutory consequence of two prior dismissals by overcharging an offense in a third filing. *People v Salcido* (2008) 166 CA4th 1303, 1312–1313, 83 CR3d 561. For discussion of this exception generally, see Simons, Preliminary Examinations §4.4.6.

e. [§92.96] Setting Misdemeanor for Trial

When a defendant is charged with a both a felony and a misdemeanor offense and he or she is not held to answer on the felony, the magistrate must order that the defendant be arraigned on the misdemeanor and a trial date fixed. *People v Hardin* (1967) 256 CA2d Supp 954, 961, 64 CR 307. If the misdemeanor is dismissed, Pen C §1387 bars any further prosecution for the same offense. *Marler v Municipal Court* (1980) 110 CA3d 155, 162, 167 CR 666.

f. [§92.97] Dismissal of Part of a Complaint

Dismissal of part of the complaint is also subject to the two-dismissal rule. Thus, if the magistrate dismisses a special circumstance allegation, that dismissal is an order terminating the action under Pen C §1387 and is subject to the two-dismissal rule. *Ramos v Superior Court* (1982) 32 C3d 26, 34, 184 CR 622.

5. [§92.98] Dismissal in Furtherance of Justice Under Pen C §1385

A magistrate has jurisdiction to dismiss an action in the interests of justice, either on his or her own motion or on the prosecutor's application. Pen C §1385(a). Although the defendant has no statutory authority under Pen C §1385(a) to move to dismiss in furtherance of justice, the defendant may invite the court to exercise its discretion under Pen C §1385. See *People v Konow* (2004) 32 C4th 995, 1022, 88 P3d 36; *People v Harris* (1991) 227 CA3d 1223, 1225, 278 CR 391. A magistrate's failure or refusal to respond to the defendant's invitation and hear a motion to dismiss based on a legal ground for dismissing the prosecution does not result in an illegal commitment of the defendant. *Jackson v Superior Court* (1982) 135 CA3d 767, 771, 185 CR 766.

A determination of whether to dismiss in the interests of justice involves a weighing of the evidence of the defendant's guilt or innocence, a consideration of the crime involved, the length of the defendant's incarceration, the possible burden placed on the defendant by a retrial, and

the likelihood of additional evidence being presented in a retrial. *People v Superior Court* (Howard) (1968) 69 C2d 491, 505, 72 CR 330.

The following are proper grounds for dismissal:

- There is insufficient evidence to support a conviction. See, *e.g.*, *People v Polk* (1964) 61 C2d 217, 229, 37 CR 753.
- The prosecutor is unable to proceed because his or her witnesses are unavailable or because he or she wishes to refile to add additional defendants or counts. See *Casey v Superior Court* (1989) 207 CA3d 837, 844, 255 CR 81.

For further discussion, see Simons, Preliminary Examinations §§4.3.1–4.3.7.

6. [§92.99] Issuing Holding Order Under Pen C §872(a)

When the magistrate finds sufficient cause to support the allegations against the defendant, the magistrate must issue a holding order and sign the order endorsed on the complaint as follows: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the facts, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe that the within named A. B. is guilty, I order that he or she be held to answer to the same." Pen C §872(a).

The magistrate must specify in the holding order the offenses for which the defendant is bound over for trial. *People v Estrada* (1987) 188 CA3d 1141, 1147, 233 CR 754. If the offense is bailable, and the defendant is admitted to bail, a statement to that effect must be added to the order. Pen C §875. If the offense is not bailable, the order must state that the defendant is committed to the county sheriff. Pen C §873.

In addition to the holding order endorsed on the complaint, the magistrate must also make out a commitment, signed by the magistrate. Pen C §876. The commitment must set forth the magistrate's name, and must be delivered, together with the defendant, to the custodial or peace officer. Pen C §876. The form of commitment for a defendant following a probable cause determination is set forth in Pen C §877. The form of commitment for a defendant who has pleaded guilty is set forth in Pen C §877a.

I. Motion To Reduce Felony ("Wobbler") to Misdemeanor

1. [§92.100] Determining Whether To Grant Reduction of Felony to Misdemeanor

A felony is a crime punishable by death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except

those offenses that are classified as infractions. Pen C §§17(a), 18. Some offenses include alternative penalties, *i.e.*, confinement in state prison or in the county jail. Such an offense is a felony when the punishment is confinement in state prison and a misdemeanor when any other punishment is imposed. This type of offense, with alternative sentences, is commonly called a "wobbler."

A magistrate may determine that a wobbler charged as a felony is a misdemeanor and accordingly reduce the charge at or before the preliminary hearing. The magistrate may make this determination either on a party's motion or on the magistrate's own motion after considering the evidence. Pen C §17(b)(5). The magistrate does not need the prosecution's consent to reduce a charge to a misdemeanor. *Esteybar v Municipal Court* (1971) 5 C3d 119, 127, 95 CR 524. The magistrate must base the determination on the facts and circumstances of the case. 5 C3d at 125; *People v Kunkel* (1985) 176 CA3d 46, 52 n6, 221 CR 359.

A magistrate may reduce a wobbler, even in a "three strikes" case. See *People v Superior Court* (Alvarez) (1997) 14 C4th 968, 979–981, 60 CR2d 93; discussion in Simons, Preliminary Examinations §§4.5.8–4.5.9. However, a magistrate has no authority to

- Reduce a felony that is not a wobbler. *People v Superior Court* (Feinstein) (1994) 29 CA4th 323, 330, 34 CR2d 503 (magistrate may not substitute other related charges).
- Reduce a felony to a different crime. 29 CA4th at 329.
- Fix the degree of an offense. *People v Estrada* (1987) 188 CA3d 1141, 1147, 233 CR 754; *People v Buckley* (1986) 185 CA3d 512, 522, 228 CR 329. For example, when an offense is one of varying degrees, such as burglary, and the greater degree is not a wobbler but the lesser is, the magistrate cannot reduce the offense to a lesser degree and then reduce it to a misdemeanor without the prosecutor's consent, unless the evidence shows only the lesser degree. See Pen C §§1192.1–1192.2, 1192.4.
- Reduce the charges to a misdemeanor when the court has ordered felony counts to be reinstated under Pen C §871.5. *People v Draper* (1996) 42 CA4th 1627, 1631–1634, 50 CR2d 335.

If the prosecutor seeks to reduce a felony offense to a misdemeanor, the defendant can require that it remain a felony. Pen C §17(b)(4); *Larson v Municipal Court* (1974) 41 CA3d 360, 362–365, 116 CR 1.

After the magistrate has reduced the felony to a misdemeanor under Pen C §17(b)(5), the prosecution may not dismiss and refile the charge as a felony unless the magistrate consents. *Malone v Superior Court* (1975) 47 CA3d 313, 318–319, 120 CR 851. Nor may the prosecution seek

review by bringing a motion to reinstate the felony. *People v Williams* (2005) 35 C4th 817, 822–823, 110 P3d 1239.

☛ JUDICIAL TIP: Most judges handle motions to reduce a wobbler as sentencing decisions. They require sufficient information about the offense and the offender to enable them to make an informed decision about the matter, based on the facts of the case. Judges also usually take into account prevailing sentencing practices. If the motion is made at a prehearing conference as part of plea negotiation, some judges will review the probation report and ask the prosecution if there is any reason to oppose the motion and, if so, to state the reasons for the opposition. This practice gives the court a more complete basis from which to determine the motion before the preliminary hearing.

Some judges consider whether the facts warrant granting the reduction at this point in the proceeding or whether the defendant should earn the reduction by successful completion of probation. A defendant who is granted felony probation without imposition of a sentence on a wobbler can move to have it reduced to a misdemeanor after successfully completing probation. Pen C §17(b)(3).

Most judges refuse to grant a reduction before the evidence has been presented at the preliminary hearing. However, if defense counsel and the prosecution both request the reduction, many judges will ask both counsel to present a stipulated set of facts, including information on the offender, before ruling on the motion.

For further discussion, see Simons, Preliminary Examinations §§4.5.1–4.5.4, 4.5.7–4.5.11.

2. [§92.101] Ruling on Motion Not To Be Conditioned on Defendant's Plea

The magistrate may not require the defendant to plead guilty as a condition of reducing the charge to a misdemeanor under Pen C §17(b)(5). *Jackson v Superior Court* (1980) 110 CA3d 174, 177, 167 CR 749. The magistrate also may not ask the defendant what plea he or she would enter if the magistrate were to reduce the charge to a misdemeanor under Pen C §17(b)(5). *Hartman v Superior Court* (1982) 135 CA3d 205, 207–209, 185 CR 182.

☛ JUDICIAL TIP: Most judges will accept a plea bargain that entails the grant of a Pen C §17(b)(5) motion by the magistrate.

Judges may also accept a conditional plea of guilty to a felony, *e.g.*, that no state prison be imposed. This arrangement is not equivalent to the grant of a Pen C §17(b)(5) motion.

J. Motion To Reduce Bail and To Release on Own Recognizance (OR)

1. [§92.102] In General

After the magistrate has issued a holding order, defense counsel often make requests for a reduction of bail or for release of the defendant on his or her own recognizance. The magistrate should consider these motions at this time before committing the defendant for trial.

2. [§92.103] Setting Bail

A defendant who has been held to answer after the preliminary hearing may be admitted to bail by the magistrate who has held the defendant to answer or by any magistrate who has the power to issue a writ of habeas corpus. Pen C §§1273, 1277–1278. Once the magistrate has allowed bail and the undertaking has been executed and approved, the magistrate must order the defendant discharged and deliver the order to the officer in charge. Pen C §1281.

A defendant is generally entitled to be released on bail unless he or she is charged with (Cal Const art I, §12; Pen C §1271)

- A capital offense for which the facts are evident or the presumption is great;
- A violent felony for which the facts are evident or the presumption is great and the court finds on clear and convincing evidence that there is a substantial likelihood that the defendant's release would result in great bodily harm to another; or
- Any felony for which the facts are evident or the presumption is great and the court finds on clear and convincing evidence that the defendant has threatened another with great bodily harm and that there is a substantial likelihood that the defendant would carry out the threat if released.

The magistrate must determine the existence of a substantial likelihood of harm on the basis of the specific circumstances of the case. *In re Nordin* (1983) 143 CA3d 538, 543, 192 CR 38.

In setting, reducing, or denying bail, public safety and the safety of the victim are the primary considerations, but the magistrate must also consider the safety of the victim's family, seriousness of the offense, the defendant's previous criminal record, and the probability of the defendant's subsequent appearances. Cal Const art I, §28(b)(3), (f)(3); Pen C §1275(a). The magistrate's statement of reasons for setting bail should contain more than mere findings of ultimate fact or a recitation of the relevant criteria for release on bail. It should clearly articulate the basis for

the magistrate's use of such criteria. *In re Christie* (2001) 92 CA4th 1105, 1107, 1109–1110, 112 CR2d 495 (magistrate must set forth reasons for setting bail in excess of bail schedule).

For a comprehensive discussion of bail, see California Judges Benchguide 55: *Bail and Own-Recognizance Release* §§55.2 (checklist), 55.9–55.19 (Cal CJER).

3. [§92.104] OR Release

Some defendants may be released on their own recognizance in the court's discretion. Cal Const art I, §§12, 28(f)(3). Any defendant who has been charged with a noncapital offense is entitled to release on his or her own recognizance. Pen C §1270(a); see Pen C §§1318 et seq for limitations on OR release. It may be granted by a court or magistrate who could release the defendant from custody on bail, unless the court makes a finding on the record in accordance with Pen C §1275, that an OR release will compromise public safety or the safety of the victim, or will not reasonably assure the defendant's appearance at subsequent proceedings. Pen C §1270(a). Cal Const art I, §28(f)(3). Public safety and the safety of the victim are the primary considerations. Cal Const art I, §28(f)(3). If the court makes one of these findings, it must set bail and specify any conditions under which the defendant may be released. Pen C §1270(a). A hearing must be held before a defendant who has been charged with a serious or violent felony or certain other witness tampering and domestic-related felonies where force or threat of violence are elements of the crime may be released on OR. Pen C §1270.1(a).

In addition, a noticed hearing must be held in open court before a defendant arrested for a violent felony (see Pen C §667.5) may be released on OR. Pen C §1319(a). OR may not be granted if it appears by clear and convincing evidence that the defendant failed to appear for a prior felony case. Pen C §1319(b). In all other cases, the court must consider the existence of any outstanding felony warrants, other information presented in a Pen C §1318.1 report, and any other information presented by the prosecuting attorney in determining whether to grant OR. Pen C §1319(b).

A defendant also may not be released on OR without an open court hearing if the defendant (1) is currently on felony probation or felony parole, or (2) has failed to appear in court as ordered, resulting in a warrant being issued, three or more times over the three years preceding the current arrest, and is arrested for any felony offense or certain other crimes (street terrorism, assault and battery, theft, burglary, or crime with the use of a firearm). Pen C §1319.5.

For a comprehensive discussion of OR Release, see California Judges Benchguide 55: *Bail and Own-Recognizance Release* §§55.4 (checklist) and 55.43–55.48 (Cal CJER).

K. Making Findings at Preliminary Hearing

1. [§92.105] Scope of Findings

At the preliminary hearing, the magistrate has no authority to make findings concerning the defendant's guilt or innocence. See *People v McGlothen* (1987) 190 CA3d 1005, 1011, 235 CR 745. The magistrate's limited role is to determine whether there is sufficient cause to believe the defendant is guilty of a public offense and should be bound over for trial. See Pen C §872; discussion in §92.85. In making this determination, the magistrate may weigh the evidence, resolve conflicts, and give or withhold credence to particular witnesses. *People v Uhlemann* (1973) 9 C3d 662, 667, 108 CR 657.

Both factual and legal findings may be made at the preliminary hearing. See §§92.105, 92.107. The magistrate may make factual findings not only on charged counts, but on uncharged counts and enhancements arising from the evidence presented at the preliminary hearing. *People v Manning* (1982) 133 CA3d 159, 165, 183 CR 727.

2. [§92.106] Adding Charges in Information

In addition to the charges contained in the holding order, the prosecution may file an information including a charge or charges under Pen C §739 that are shown by the evidence at the preliminary hearing and are not inconsistent with any factual findings by the magistrate. *Jones v Superior Court* (1971) 4 C3d 660, 664, 94 CR 289. The evidence at the preliminary hearing must also show that the additional charge is transactionally related to the offense for which the defendant was held to answer. 4 C3d at 665; *People v Encerti* (1982) 130 CA3d 791, 799, 182 CR 139. The totality of the evidence presented at the preliminary hearing, not the complaint alone, puts the defendant on notice of the potential charges he or she may have to face at trial. *People v Manning* (1982) 133 CA3d 159, 165, 183 CR 727.

If the defendant waived the preliminary hearing, the prosecutor may not allege additional charges in the information because Pen C §1009 prohibits amending the information to charge an offense not shown by the evidence taken at the preliminary hearing. *People v Winters* (1990) 221 CA3d 997, 1005–1008, 270 CR 740.

For further discussion, see Simons, Preliminary Examinations §§4.6.1–4.6.6.

3. [§92.107] Distinguishing Factual Findings From Legal Conclusions

Factual findings are binding on the prosecution; legal conclusions are not. See *People v Uhlemann* (1973) 9 C3d 662, 667, 108 CR 657.

There is considerable uncertainty in distinguishing factual findings from legal conclusions. The appellate decisions recognize this problem. See, *e.g.*, *People v Superior Court* (Day) (1985) 174 CA3d 1008, 220 CR 330. Some findings can be clearly differentiated from conclusions. The credibility of a witness is a question of fact for the magistrate. A reviewing court will not substitute its judgment for that of the magistrate on a finding of fact. *Jones v Superior Court* (1971) 4 C3d 660, 664, 94 CR 289.

When the magistrate concludes, for example, that the evidence is legally insufficient to show the charged offense, that is a legal conclusion. 4 C3d at 664. Similarly, if the magistrate finds no evidence of malice in a murder prosecution, that is a legal conclusion. *Dudley v Superior Court* (1974) 36 CA3d 977, 981, 111 CR 797.

Factual findings include findings that the offense never occurred, that the victim consented, or that a witness was not credible. Legal conclusions are determinations that the evidence does not support the charged offense or that a particular element has not been proved. See *People v Superior Court* (Quinteros) (1993) 13 CA4th 12, 20, 16 CR2d 462.

Another reason for distinguishing factual findings from legal conclusions is that only legal conclusions may be challenged by the defense on a Pen C §995 motion or by the prosecution on a Pen C §871.5 petition.

For further discussion concerning distinguishing legal conclusions from factual findings and implied factual findings, see Simons, Preliminary Examinations §4.6.2.

4. [§92.108] Effect of Factual Findings on Information

The prosecutor may not include in the information any new offenses transactionally related to the charges for which the defendant was held to answer or any charges in the complaint that were rejected at the preliminary hearing if the magistrate has made factual findings inconsistent with the new or rejected charges. *People v Slaughter* (1984) 35 C3d 629, 643, 200 CR 448. The magistrate's power to make factual findings controls the ultimate disposition of the charges filed in the case. *Jones v Superior Court* (1971) 4 C3d 660, 667, 94 CR 289.

In contrast to the controlling effect of factual findings, legal conclusions of the magistrate do not limit the prosecutor's discretion to file new or rejected charges in the information. *People v Encerti* (1982) 130 CA3d 791, 799, 182 CR 139. For example, if the magistrate makes a

legal conclusion that one of the charges has not been proved and dismisses that charge, the prosecutor may include it in the information. *People v Farley* (1971) 19 CA3d 215, 221, 96 CR 478.

☛ JUDICIAL TIP: If the magistrate does not believe a witness whose testimony is essential to sustaining a charge, the magistrate should make a clear finding on the witness's credibility. That finding, factual in nature, will control the prosecutor's discretion in filing new or rejected charges with the court.

5. [§92.109] Making Findings on Sufficiency of Evidence To Support Allegations of Uncharged Offenses

One appellate court has held that the defendant may request a ruling from the magistrate on the sufficiency of the evidence presented at the preliminary hearing regarding every possible charge that may be alleged against the defendant in the information. *People v Brice* (1982) 130 CA3d 201, 210, 181 CR 518. Another court criticized the ruling in *Brice* as "an attempt to create a substantial right to a useless, nonbinding determination" and declined to follow the *Brice* "dictum." *People v Estrada* (1987) 188 CA3d 1141, 1147, 233 CR 754. See *People v Buckley* (1986) 185 CA3d 512, 522, 228 CR 329, in which the court reiterated the rule that with the exception of the legal conclusion of sufficiency of the evidence, the magistrate's findings are discretionary. See also *People v Estrada, supra*, 188 CA3d at 1146 (magistrate must only make findings for one offense he or she believes defendant committed, and need not make findings on each possible charge).

☛ JUDICIAL TIP: Some judges preface their response to a request for a ruling under *People v Brice* with the admonition that "I will make the ruling you request though it is nonbinding and will not preclude the District Attorney from filing uncharged offenses under Pen C §739."

6. [§92.110] Motion Under Pen C §17(b)(5) Regarding Uncharged Offenses

If the magistrate, in response to a defendant's request under *People v Brice* (1982) 130 CA3d 201, 181 CR 518 (see §92.109), makes a ruling on the sufficiency of the evidence of uncharged offenses, the magistrate must also rule on the defendant's request to reduce any uncharged wobblers to a misdemeanor. *People v Manning* (1982) 133 CA3d 159, 165, 183 CR 727; see discussion in §92.100.

IV. SAMPLE FORMS

A. [§92.111] Script: Waiver of Preliminary Hearing

(1) *Call the case:*

People versus _____.

[*To defendant*]

Are you [*Mr./Ms.*] [*name of defendant*], the defendant in this case?

(2) *Proposed waiver*:

[*Mr./Ms.*] [*name of defendant*], you are here charged with [*summarize charges in complaint*]. You have a right to a preliminary hearing on those charges. Your lawyer tells me that you want to give up that right. Is that correct?

[*If there are conditions on the waiver*]

I understand the parties have agreed to conditions on the waiver, and [*your lawyer/the prosecutor*] is going to state those conditions for the record. Please listen to those conditions so we can make sure you understand them. If you have any questions about them, you can ask me.

[*Defense counsel or prosecutor states conditions*]

Note: Ordinarily, if a defendant waives a preliminary hearing, the prosecution may not file additional charges in the information, but is limited to those charges made in the complaint. However, a waiver may be conditioned on the agreement that the prosecution may file additional, specified charges or enhancements, particularly if the case is not resolved before trial. Any such conditions on the waiver should be specifically stated and made a part of the waiver. See Pen C §1009; *People v Winters* (1990) 221 CA3d 997, 1005, 270 CR 740.

[*Mr./Ms.*] [*name of defendant*], have you discussed this waiver with your attorney?

Do you understand the conditions that [*your lawyer/the prosecutor*] has stated here as a part of the agreement?

Do you have any questions about those conditions?

[*To prosecutor*]

[*Mr./Ms.*] [*name of prosecutor*], are the People prepared to waive the preliminary hearing [*on these conditions*]?

(3) *Waiver:*

[*To defendant*]

[*Mr./Ms.*] [*name of defendant*], you have the right to make the prosecution prove in a preliminary hearing in this court that you probably committed the offenses with which you are charged. Do you understand that right? Do you give it up?

At the preliminary hearing, you have the right to see and hear any witnesses called by the prosecutor to testify in open court against you and to have your attorney question them. Do you understand that right? Do you give it up?

At the preliminary hearing, you have the right to present evidence on your behalf and to testify if you wish to do so, although no one can make you testify against yourself unless you choose to testify. Do you understand that right? Do you give it up?

Now, if you waive your right to a preliminary hearing, you are giving up all those rights that I just explained to you. Do you understand? Do you have any questions about that?

If you give up those rights, you will be bound over for trial and will be charged with all those offenses that you are now accused of [*and any additional charges that were included in the conditions on the waiver*]. Once those charges are filed, your case will proceed to trial. Do you understand?

Do you have any questions about the rights you are giving up or what will happen if you waive this preliminary hearing?

Has anyone threatened you in any way to make you do this?

Has anyone promised you anything, other than what we have just discussed here in open court.

So having all that in mind, do you wish to give up all these rights that I have explained to you?

Counsel, is this waiver made with your consent?

Do the People also waive their right to a preliminary hearing?

(4) *Taking the waiver:*

[*Mr./Ms.*] [*name of defendant*], do you give up your right to have a preliminary hearing in Case Number _____?

As part of this waiver, do you also agree that the prosecutor may accuse you of the following additional offenses if this matter is not resolved before trial?

Do counsel for both parties agree to the waiver?

(5) *Finding:*

I find the defendant knows and understands [*his/her*] rights, the terms of the agreement, and the consequences of this waiver. I further find that the defendant has freely, voluntarily, and intelligently waived those rights.

(6) *Order:*

Accordingly, the defendant is certified to this court under the order I am now signing. The defendant is directed to appear in Department _____ on [*date*], at [*time*]. [*The defendant may remain on bail in the sum previously posed/may be admitted to bail in the amount of $*_____].

B. [§92.112] Script: Waiver of One-Session Rule

(1) *Advisement:*

[*This waiver must be personally taken from defendant*]

[*Mr./Ms.*] [*name of defendant*], you have the right to have your preliminary hearing held in one continuous session. That means you have the right to have me work on your case and no other, except for attending to brief court matters that may require my attention, until your case is completed. If we do not finish your case by the end of the court day, you have the right to have us begin with your case first thing tomorrow and each full court day after that until your case is finished. Do you understand?

(2) *Waiver:*

Your lawyer is advising that you give up that right. Do you understand? Do you have any questions about the right you are being asked to give up? Do you give up that right?

[*Defendant responds*]

Counsel, is this waiver with your consent?

[*Counsel responds*]

The court finds that the defendant's waiver of the right to a continuous, one-session preliminary hearing is freely, knowingly, and intelligently made and thus accepts the waiver.

C. [§92.113] Script: Taking Plea at Preliminary Hearing

(1) *Call the case:*

Clerk: Calling the matter of the People of the State of California versus [*name of defendant*].

[*To defendant*]

Clerk: Is that your true name, [*Sir/Madam*]?

Clerk: [*Mr./Ms.*] [*name of defendant*] is being charged with [*state charges in complaint.*]

(2) *Proposed Plea:*

[*Mr./Ms.*] [*name of defendant*], I understand that an agreement has been reached in this case. Please turn your attention to the prosecutor. [*He/She*] will state what will happen to you if you plead guilty/no contest in this case.

[*Prosecutor states charges and conditions*]

[*Mr./Ms.*] [*name of defendant*], did you understand everything that's been said?

[*Defendant responds*]

(3) *Waiver:*

Are these the terms and conditions upon which you are willing to plead guilty/no contest?

[*Defendant responds*]

Has anyone made any promises other than those made here in open court in order to get you to plead guilty/no contest?

[*Defendant responds*]

Has anyone threatened you or forced you to plead guilty/no contest?

[*Defendant responds*]

Are you under the influence of alcohol or any drug, narcotic, or medication?

[*Defendant responds*]

[For no-contest plea]

Your no-contest plea(s) will have the same force and effect as guilty pleas. If you plead no contest, I'm going to find you guilty. Do you understand that?

[*Defendant responds*]

Is there a factual basis for this plea, Counsel?

[*Prosecutor and defense counsel respond:*]

If you are not a citizen of the United States, you should assume that your plea will result in your deportation, exclusion from reentry to the United States, and denial of naturalization under the laws of the United States. Do you understand that?

[*Defendant responds*]

As a direct result of this plea [*summarize plea agreement*],

[*Add if subject to four-way search clause*]

you will have to make your person, your place of residence, any personal property under your immediate control, and any vehicle under your control, subject to search, night or day, with or without probable cause. And the search can be conducted by a peace officer or probation officer.

You will have to pay a restitution fine of not less than $200 and not more than $10,000,

[*Add if probation is to be granted*]

In addition to the restitution fine, the court will order a separate probation revocation restitution fine in the same amount as the restitution fine. This fine will be stayed pending your successful completion of probation at which time it will be permanently stayed. However, if you violate probation, the stay will be lifted and you will be required to pay this fine also. Do you understand?

[*Add if sentenced to state prison*]

In addition to the restitution fine, the court will order a separate parole revocation restitution fine in the same amount as the restitution

fine. This fine will be stayed pending your successful completion of parole at which time it will be permanently stayed. However, if you violate parole then the stay will be lifted and you will be required to pay this fine also. Do you understand?

[*Defendant Resp*onds]

[*Add if crime with a victim*]

You will have to pay restitution to the victim(s) on all [*number of counts*] counts charged, even those that have been dismissed, in an amount determined by the court to fully reimburse the victim(s) for economic losses. Do you understand that?

[*Defendant responds*]

Do you give up your right to appeal this conviction?

[*Defendant responds*]

Do you give up your right to make any motions in this case?

[*Defendant responds*]

If you violate the terms and conditions of probation, you could be sentenced to [*state consequences of violation*]. If you were sent to state prison, upon your release, you would be placed on supervised parole after having served your sentence. There would be terms and conditions of parole. If you violated parole, you would be sent back to state prison for up to one year for each such violation. Do you understand that?

[*Defendant responds*]

Do you understand that another judge will be sentencing you and that it will not be me.

[*Defendant responds*]

Do you understand that the conditional plea(s) we have discussed will not be binding on the sentencing judge before whom you will appear for sentencing. If that judge disapproves of the plea(s) and conditions, you will be permitted to withdraw your plea(s) of [*guilty/no contest*], your not-guilty plea will be reentered, all dismissed charges will be reinstated, and your case will be scheduled for a preliminary hearing?

[*Defendant responds*]

You have certain rights as a defendant. You have a right to have a preliminary examination. That's a hearing before the court where the prosecutor presents evidence to the court. You, through your attorney, can present evidence to the court. The judge then decides whether there's sufficient basis to believe a crime has been committed and whether you committed that crime. If the judge did so decide, you would be held to answer to the charge or the charges for trial. If the judge decided otherwise, you would be discharged or released. Do you understand that you have a right to a preliminary examination as described?

[*Defendant responds*]

At that preliminary examination, you have the right to confront and cross-examine witnesses against you. You have a right to have an attorney to assist you in doing that. You can bring in witnesses who will testify for you. It doesn't cost you any money. You can use the subpoena power of the court. You can also testify at that hearing. On the other hand, you can remain silent and not incriminate yourself. Do you understand that you have these rights at your preliminary examination?

[*Defendant responds*]

If you plead guilty/no contest today, you are going to give up your right to a preliminary examination together with the other rights described. Do you understand that?

[*Defendant responds*]

Do you give up your right to a preliminary examination, together with the other rights described?

[*Defendant responds*]

You also have a right to have a trial by judge or by jury, and at that trial, you can exercise the rights I described earlier. You can confront and cross-examine witnesses, and bring in witnesses who will testify for you and have the assistance of the court in ordering those witnesses to come to court. You can testify at trial. You can remain silent and not incriminate yourself. Do you understand that you have a right to trial, together with these other rights described?

[*Defendant responds*]

If you plead no contest today, you are going to give up your right to trial, together with these other rights described. Do you understand that?

[*Defendant responds*]

Do you give up your right to trial, together with the other rights described?

[*Defendant responds*]

What is your plea to [*state violation*]?

[*Defendant responds*]

[*Or if there is more than one count*]

What is your plea to [*state violation*], as described in Count 1 of this Complaint?

[*Add requests for plea for each additional count*]

[*Defendant responds*]

[*If there are enhancements or priors*]

Do you admit the [*state enhancement and/or prior conviction*] as to Count(s) ___?

(4) *Findings:*

I find that you have been fully informed of your rights. You understand them and have made a knowing, free, voluntarily, and intelligent waiver of those rights. I find that you've been fully informed of the consequences of your plea. You do understand what's going to happen to you.

I find a factual basis for your plea, and I accept it and I find you guilty [*and I find the [enhancement and/or prior conviction] to be true*]. [*Add any changes in the complaint, e.g., I dismiss Counts 3 and 4, pursuant to the negotiated disposition.*]

(5) *Post Plea Orders*

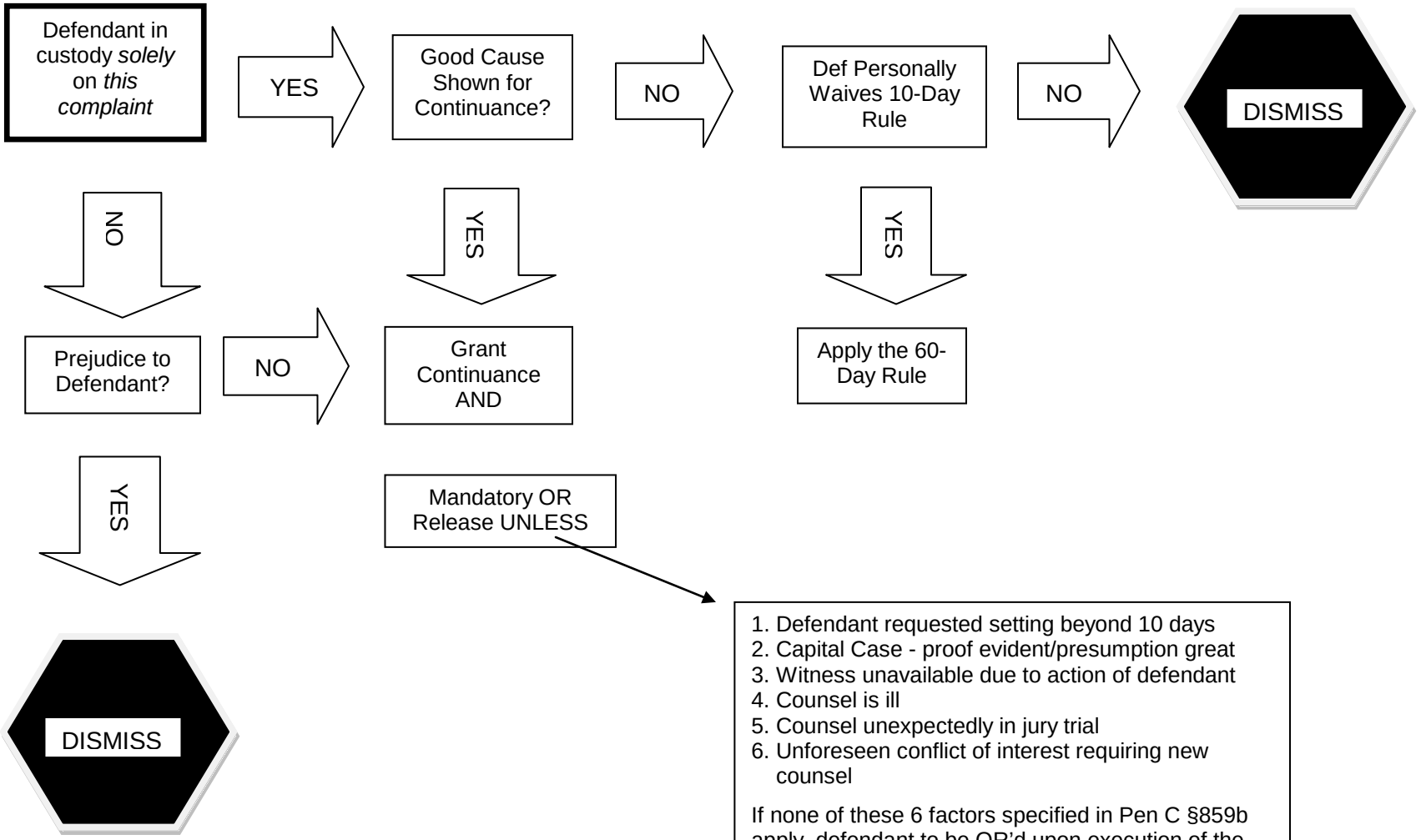
I certify the case to the Superior Court and set pronouncement of judgment at [*time*] in Department ___ on [*date*]. The matter is referred to the Probation Department to prepare a presentence report.

[*If the plea agreement indicates immediate sentencing*]

The plea agreement contemplates immediate sentencing. You understand that you have a right to have this matter certified to the Superior Court and to have a presentence report prepared in this matter? Do you waive these rights and ask this court to sentence you forthwith pursuant to the plea agreement?

[*Proceed to Pronouncement of Judgment*]

Appendix: Operation of the 10-Day Rule



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